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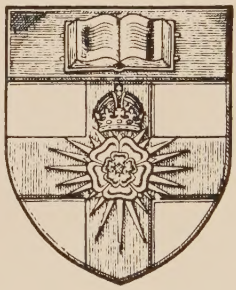

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AND ON APPEAL THEREFROM IN THE

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VOL. X.

1882-83.—XLVI AND XLVII VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1883.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Abbott, Knight *v.*		11
Abouloff *v.* Oppenheimer	(C. A.)	295
Adams *v.* Clutterbuck		403
Alford, Fuller *v.*		418
Alloway *v.* Steere		22
Amesbury (Guardians of) *v.* Justices of Wilts		480
Anderson, Read *v.*		100
Ancketill *v.* Baylis	(C. A.)	577
Archer, Langrish *v.*		44
Askew *v.* Lewis		477
Attorney-General *v.* Emerson	(C. A.)	191
——— *v.* Hubbuck		488
Ayscough, Goodhand *v.*		71

B.

Badart, Dick *v.*		387
Baildon Local Board, Maude *v.*		394
Barber, Lenham *v.*		293
Baylis, Ancketill *v.*	(C. A.)	577
Bell *v.* Love		547
—— *v.* Stocker		129
Berks (Justices of), Coomber *v.*	(C. A.)	267
Bishop Auckland Local Board *v.* Bishop Auckland Iron Company		138
Bishop Auckland Iron Company, Bishop Auckland Local Board *v.*		138
Blaiberg *v.* Parke		90
Blyth and Fanshawe, In re	(C. A.)	207
Bolckow *v.* Fisher	(C. A.)	161
Brasch, Millen *v.*	(C. A.)	142
Briggs *v.* Swanwick		510
Brown *v.* Manchester and Lincolnshire Railway Company	(C. A.)	250
———, Reg. *v.*	(C. C. R.)	381
Burdick *v.* Sewell		363
Burton, Davis *v.*		414
——— *v.* English		426

C.

Caine, Re		284
Carr, Reg. *v.*	(C. C. R.)	76

	PAGE
Central Wales Railway Company, Great Western Railway Company *v.*	231
Chapman, Re (C. A.)	54
Charlton, Fawcus *v.*	516
Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Company (C. A.)	521
Chester (Bishop of), Lowe *v.*	407
City Offices Company, Pryor *v.*	504
Clutterbuck, Adams *v.*	403
Cooke *v.* Newcastle Water Company	332
Coomber *v.* Justices of Berks (C. A.)	267

D.

Darley Main Colliery Company, Mitchell *v.*	457
D'Avigdor, Roope *v.*	412
Davis *v.* Burton	414
——— *v.* Morris	436
D'Hormusgee *v.* Grey	13
Dick *v.* Badart	387
Dobbs *v.* Grand Junction Waterworks Company (C. A.)	337
Doughty *v.* Firbank	358
Durrant, Fore Street Warehouse Company *v.*	471
Dymock *v.* Watkins (C. A.)	451

E.

Elsey, Gage *v.*	518
Emerson, Attorney General *v.* (C. A.)	191
English, Burton *v.*	426

F.

Fawcus *v.* Charlton	516
Field, Kay *v.* (C. A.)	241
Firbank, Doughty *v.*	358
Fisher, Bolckow *v.* (C. A.)	161
Flowers *v.* Sadler	572
Foote, Reg. *v.* (C. A.)	378
Fore Street Warehouse Company *v.* Durrant	471
Fortnum, Hance *v.*	218
Fraser *v.* Mason	398
Friend *v.* Towers	87
Fuller *v.* Alford	418

G.

Gage *v.* Elsey	518
Garrard *v.* Lewis	30
General Steam Navigation Company, Shaffers *v.*	356
Goodhand *v.* Ayscough	71
Grand Junction Waterworks Company, Dobbs *v.*(C. A.)	337
Great Western Railway Company *v.* Central Wales Railway Company	231
Green, Humphreys *v.* (C. A.)	148
Grey, D'Hormusgee *v.*	13

H.

Hance *v.* Fortnum	218
Hardbottle *v.* Terry	131
Hart, Tibbett *v.*	483
Hind, Vinter *v.*	63
Hiscocks *v.* Jermonson	360
Hogg, Johnston *v.*	432
Holme, Lowe *v.*	286
Hubbuck, Attorney General *v.*	488
Huddersfield (Mayor of), Milnes *v.*	124
Humphreys *v.* Green (C. A.)	148
Hunnings *v.* Williamson	459

J.

Jermonson, Hiscocks *v.*	360
Johnston *v.* Hogg	432

K.

		PAGE
Kay *v.* Field	(C. A.)	241
——, Reg. *v.*		213
Kearsley *v.* Philips		36
——— *v.* ———	(C. A.)	465
Kennard, Moore *v.*		290
Kent *v.* Worthing Local Board		118
Knight *v.* Abbott		11

L.

Lamb *v.* Munster		110
Lambeth Assessment Committee, Smith *v.*	(C. A.)	327
Langrish *v.* Archer		44
Legg, Scott *v.*	(C. A.)	236
Lenham *v.* Barber		293
Lewis, Askew *v.*		477
——, Garrard *v.*		30
Local Government Board, Reg. *v.*	(C. A.)	309
Love *v.* Bell		547
Lowe *v.* Bishop of Chester		407
——— *v.* Holme		286

M.

McGiffin *v.* Palmer's Shipbuilding Company		5
Manchester (Overseers of), Salford (Guardians of) *v.*		172
Manchester and Lincolnshire Railway Company, Brown *v.*	(C. A.)	250
Mason, Fraser *v.*		398
Maude *v.* Baildon Local Board		394
Maurer, Reg. *v.*		513
May, Richards *v.*		400
Mersey Steamship Company *v.* Shuttleworth		468
Millen *v.* Brasch	(C. A.)	142
Milnes *v.* Mayor of Huddersfield		124
Mitchell *v.* Darley Main Colliery Company		457
Moore *v.* Kennard		290
Morris, Davis *v.*		436
Munday *v.* Thames Ironworks Company		59
Munster, Lamb *v.*		110
Munster *v.* Railton		475

N.

Nash, Reg. *v.*	(C. A.)	454
Netherlands India Steam Navigation Company *v.* Chartered Mercantile Bank of India *v.*	(C. A.)	521
Newcastle Water Company, Cooke *v.*		332

O.

Oppenheim, Abouloff *v.*	(C. A.)	295

P.

Palmer's Shipbuilding Company, McGiffen *v.*		5
Parke, Blaiberg *v.*		90
Philips, Kearsley *v.*		36
———, ——— *v.*	(C. A.)	465
Pryor *v.* City Offices Company		504

R.

Railton, Munster *v.*		475
Ratcliffe, Reg. *v.*	(C. C. R.)	74
Read *v.* Anderson		100
Reg. *v.* Brown	(C. C. R.)	381
—— *v.* Carr	(C. C. R.)	76
—— *v.* Foote	(C. A.)	378
—— *v.* Kay		213
—— *v.* Local Government Board	(C. A.)	309
—— *v.* Maurer		513

PAGE

Reg. *v.* Nash (C. A.) 454
—— *v.* Ratcliffe (C. C. R.) 74
Richards *v.* May 400
Roope *v.* D'Avigdor 412
Rymill, Watkins *v.* 178

S.

Sadler, Flowers *v.* 572
Salford (Guardians of) *v.* Overseers of Manchester 172
Saunders, Warder *v.* 114
Scott *v.* Legg (C. A.) 236
Sewell, Burdick *v.* 363
Shaffers *v.* General Steam Navigation Company 356
Shuttleworth, Mersey Steamship Company *v.* 468
Smith *v.* Lambeth Assessment Committee (C. A.) 327
Steere, Alloway *v.* 22
Stocker, Bell *v.* 129
Swansea (Mayor of) *v.* Thomas 48
Swanwick, Briggs *v.* 510

T.

PAGE

Thames Ironworks Company, Munday *v.* 59
Thomas, Mayor of Swansea *v.* 48
Terry, Hardbottle *v.* 131
Tilley *v.* Ward 17
Tippett *v.* Hart 483
Toogood, Winyard *v.* 218
Towers, Friend *v.* 87

V.

Vinter *v.* Hind 63

W.

Ward, Tilley *v.* 17
Warder *v.* Saunders 114
Watkins, Dymock *v.* (C. A.) 451
———— *v.* Rymill 178
Williamson, Hunnings *v.* 459
Winyard *v.* Toogood 218
Wilts (Justices of), Guardians of Amesbury *v.* 480
Worthing Local Board, Kent *v.* 118

TABLE OF CASES CITED.

A.

		PAGE
Ackroyd *v.* Smithson	1 Bro. C. C. 503	495
Agra and Masterman's Bank, Limited *v.* Leighton	Law Rep. 2 Ex. 56	26
Alderson *v.* Maddison	7 Q. B. D. 174	153, 154, 155, 157, 158, 159, 160
Aldridge *v.* Great Western Railway Company	15 C. B. (N.S.) 582	254
Allday *v.* Great Western Railway. Company	5 B. & S. 903; 34 L. J. (Q.B.) 5	255
Allen *v.* Liverpool	Law Rep. 9 Q. B. 180	584
——— *v.* Thompson	2 Jur. (N.S.) 451	94, 95, 96
Allhusen *v.* Labouchere	3 Q. B. D. 654, at p. 662	112
Alston *v.* Atlay	7 Ad. & E. 304	411
Andrews *v.* Salt	Law Rep. 8 Ch. 622	455
Armstrong *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 Ex. 47	525
Ashenden *v.* London and Brighton Railway Company	5 Ex. D. 190	254, 255
Aspden *v.* Seddon	Law Rep. 10 Ch. 394; 1 Ex. D. 496	568
Attorney-General *v.* Brunning	8 H. L. C. 243	494, 495, 499
——— *v.* Lomas	Law Rep. 9 Ex. 29	496
——— *v.* Rees	12 Beav. 50	68, 171
——— *v.* Thompson	8 Hare, 106, at p. 112	195
——— *v.* Wandsworth District Board of Works	6 Ch. D. 539	312
Australasia (Bank of) *v.* Niass	16 Q. B. 717	297, 301
Ayers *v.* South Australian Banking Company	Law Rep. 3 P. C. 548	377

B.

Bailey *v.* Johnson	Law Rep. 6 Ex. 279	26
Baines *v.* Bromley	6 Q. B. D. 691, n.	287, 289
Ball, Ex parte. Shepherd, In re	10 Ch. D. 667	413
Balmforth *v.* Pledge	Law Rep. Q. B. 427, 431	452
Banbury Sanitary Authority *v.* Page	8 Q. B. D. 97	140, 141, 142
Barber *v.* Meyerstein	Law Rep. 4 H. L. 317, at p. 326	363, 364
Barrs *v.* Jackson	1 Y. & C. (Ch.) 585, at pp. 595, 597; on appeal, 1 Phil. 582	307
Bathurst (Borough of) *v.* Macpherson	4 App. Cas. 256	121, 122, 123
Baxendale *v.* Bennet	3 Q. B. D. 525	31

		PAGE
Beal *v.* South Devon Railway Company	5 H. & N. 375	256
Bechervaise *v.* Great Western Railway Company	Law Rep. 6 C. P. 36	164, 168
Beeston *v.* Beeston	1 Ex. D. 13	109
Benbow *v.* Low	16 Ch. D. 93	165, 167, 193
Bent *v.* Roberts	3 Ex. D. 66	270, 272
Bewicke *v.* Graham	7 Q. B. D. 400	193, 196, 201
Bird *v.* Higginson	2 Ad. & E. 696	405
Birkley *v.* Presgrave	1 East, 220	428
Black *v.* Marine Insurance Company	11 John (N.Y.) 287	433, 434
Blackett *v.* Bradley	1 B. & S. 940	561, 568
Blackmore *v.* Vestry of Mile End Old Town	9 Q. B. D. 451	120
Bliss *v.* Collins	5 B. & Ald. 876	51, 53
Blount *v.* Harris	4 Q. B. D. 603	92
Bodenham *v.* Saint Andrew's, Worcester	1 E. & B. 465	177
Bolckow, Vaughan, & Co. *v.* Fisher	10 Q. B. D. 168	463
Bolton *v.* Corporation of Liverpool	1 My. & K. 88	196
Bonomi *v.* Backhouse	E. B. & E. 622; 9 H. L. C. 503	559
Bovill *v.* Cowan	Law Rep. 5 Ch. 495	39
Bradley *v.* Baylis	8 Q. B. D. 194	579, 580, 581, 582, 583, 584, 585, 586
Brodrick *v.* Scalé	Law Rep. 6 C. P. 98	93
Brown, In re. Ward *v.* Morse	W. N. Feb. 24, 1883, p. 31	287
Bubb *v.* Yelverton	19 W. R. 739	106, 109
Buchanan *v.* Andrew	Law Rep. 2 H. L., Sc. 286	558, 561, 562
Buccleuch (Duke of) *v.* Wakefield	Law Rep. 4 H. L. 377	555, 556, 558, 559, 561, 568, 570
Buchanan *v.* Rucker	1 Camp. 63	298
Bullen *v.* Fisher	Abbott on Shipping, 11th ed. p. 341	542
Burke *v.* South Eastern Railway Company	5 C. P. D. 1	187, 190
Burrell *v.* Nicholson	1 My. & K. 680	193
Button *v.* O'Neill	4 C. P. D. 354	94

C.

Calder and Hebble Navigation Company *v.* Pilling	14 M. & W. 76	391
Camraell *v.* Sewell	3 H. & N. 617, at p. 646 (in Ex. Ch.) 5 H. & N. 728	297
Castro *v.* Murray	Law Rep. 10 Ex. 213	413
Catt *v.* Jourle	18 W. R. 966	195
Chadwick *v.* Chadwick	22 L. J. (Ch.) 329	459, 461
Champion *v.* Formby	7 Ch. D. 373	115
Chapman *v.* Midland Railway Company	5 Q. B. D. 167	72, 74
——— *v.* Royal Netherlands Steam Navigation Company	4 P. D. 157, at p. 160	527
Chasca, The	Law Rep. 4 A. & E. 446	542
Child *v.* Hearn	Law Rep. 9 Ex. 179	525
Clerk *v.* Dumfries Commissioners of Supply	7 Sc. Sess. Cas. (4th Series) 1157	270
Cogan *v.* Stephens	5 L. J. (Ch.) 17	495
Collins *v.* Harding	Co. Rep. pt. 15, 57, Cro. Eliz. 606, 622	48
Combe *v.* Corporation of London	Y. & C. 631, at p. 651	194, 197, 199, 202, 203, 205

		PAGE
Cook *v.* Ipswich Local Board	Law Rep. 6 Q. B. 451	310
Cooper *v.* Whittingham	15 Ch. D. 504	457
Cory *v.* Bristow	2 App. Cas. 262	329, 331
—— *v.* Burr	8 Q. B. D. 313; 9 Q. B. D. 463	432
Coventry Election Petition	19 L. T. 742	292
Coverdale *v.* Charlton	3 Q. B. D. at pp. 377, 378	397
Cox *v.* Burbidge	32 L. J. (C.P.) 89	19
Crawley *v.* Isaacs	16 L. T. (N.S.) 529	298
Crooks *v.* Allan	5 Q. B. D. 38	427, 429
Croomes *v.* Gore	1 H. & N. 14; 25 L. J. (Ex.) 267	209
Custance *v.* Bradshaw	4 Hare, 315	494, 495, 499
Curteis *v.* Wormald	10 Ch. D. 172	495
Czech *v.* General Steam Navigation Company	Law Rep. 3 C. P. 14	523, 542

D.

D'Arc *v.* London and North Western Railway Company	Law Rep. 9 C. P. 325	254, 428
Dalrymple *v.* Leslie	8 Q. B. D. 5	164
Dalton *v.* Angus	6 App. Cas. 740	571
Darby *v.* Darby	3 Drew. 495	497
Dawkins *v.* Prince Edward of Saxe-Weimar	1 Q. B. D. 499	413
Death, Ex parte	18 Q. B. 647	313
De La Warr *v.* Miles	19 Ch. D. 83	209
De Lancey's Succession, Re	Law Rep. 5 Ex. 102, 105	496
Dickinson *v.* Fletcher	43 L. J. (M.C.) 25	487
Diggle *v.* Higgs	2 Ex. D. 422	108
Dodgson *v.* Scott	2 Ex. 457	451
Doe ex dem Griffiths *v.* Lloyd	3 Esp. 78	405
Doe dem Rigge *v.* Bell	5 T. R. 471	405, 406
Don *v.* Lippman	5 Cl. & F. 1, at p. 20	298
Donald *v.* Suckling	Law Rep. 1 Q. B. 585	364, 367
Doolan *v.* Midland Railway Company	2 App. Cas. 792	256
Drogheda Petition	19 L. T. (N.S.) 528	294
Dryden *v.* Overseers of Putney	1 Ex. D. 223	312
Dunkirk Colliery Company *v.* Lever	9 Ch. D. 20	336

E.

Earp *v.* Lloyd	3 K. & J. 549	194, 196
Edmunds *v.* Lord Foley	30 Beav. 282	38, 42
Egremont's (Lord) Case	6 Q. B. D. 587	451
Electric Telegraph Company *v.* Overseers of Salford	11 Ex. 181; 24 L. J. (M.C.) 146	329
Ellis *v.* Loftus Iron Company	Law Rep. 10 C. P. 10	19

F.

Fairchild *v.* Gaire	Yelv. 60	409, 410
Felkin *v.* Lord Herbert	30 L. J. (Ch.) 798	195
Ferrier *v.* Atwool	12 Jur. (N.S.) 365	195
Fisher *v.* Owen	8 Ch. D. 645	110, 112, 460, 461, 462, 463
Fitch *v.* Jones	5 E. & B. 238	105

		PAGE
Fletcher *v.* Rylands	Law Rep. 1 Ex. 265	18, 19, 20
Flory *v.* Denny	7 Ex. 581	369
Flower *v.* Lloyd	10 Ch. D. 327	297, 307, 308
Forbes *v.* Steven	Law Rep. 10 Eq. 178	494, 495, 497, 499
Ford *v.* Boon	Law Rep. 7 C. P. 150	88
—— *v.* Kettle	9 Q. B. D. 139	92
Foreman *v.* Mayor of Canterbury	Law Rep. 6 Q. B. 214	121
Foster *v.* Gamgee	1 Q. B. D. 666	115
Fowler *v.* Rickerby	2 M. & G. 760	451
Franconia, The. Reg. *v.* Keyn	2 Ex. D. 63, at p. 93	526, 545
Freeman *v.* Fairlie	3 Mer. 29	164
Freestone, Ex parte	25 L. J. (M.C.) 121	46, 47
Fulham Union *v.* Isle of Thanet Union	6 Q. B. D. 610; 7 Q. B. D. 539	173, 174

G.

Gabell *v.* South Eastern Railway Company	2 C. P. D. 416	185
Gaetano and Maria, The	7 P. D. 137	524
General Steam Navigation Company *v.* Guillon	11 M. & W. 877	545
Gibson *v.* Mayor of Preston	Law Rep. 5 Q. B. 218	119, 121, 122
Gill *v.* Dickinson	5 Q. B. D. 159	568
Glyn *v.* East and West India Docks Company	6 Q. B. D. at p. 490	364, 369, 370, 371
Glyn, Mills & Co. *v.* East and West India Docks Company	7 App. Cas. at p. 606	364, 368, 377
Godard *v.* Gray	Law Rep. 6 Q. B. 139, 148	297
Godfrey *v.* Furzo	3 P. Wms. 185	374
Goodwyn *v.* Cheveley	28 L. J. (Ex.) 298	18, 19, 20, 21
Goodyear *v.* Mayor, &c., of Weymouth	35 L. J. (C.P.) 12	402
Grant *v.* Astle	2 Doug. 722 at p. 732	399, 400
Great Western Railway Company *v.* Bishop	Law Rep. 7 Q. B. 550	139, 140, 141, 142
Grece *v.* Hunt	2 Q. B. D. 389	313
Green *v.* Hall	W. N. 1880, p. 146	294
Greenock and Wemyss Bay Railway Company *v.* Caledonian Railway Company	3 Nev. & Macn. 145	233, 235
Gresley *v.* Mousley	2 K. & J. 288	190
Grill *v.* General Iron Screw Collier Company	Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476	522, 527, 542
Gunter *v.* Halsey	Amb. 586	154
Guy *v.* Hinde	Ir. Rep. 5 C. L. 247	11

H.

Hadfield's Case	Law Rep. 8 C. P. 306	226
Hadley *v.* McDougall	Law Rep. 7 Ch. 312	39
Hall *v.* Bryon	4 Ch. D. 667	555, 559
—— *v.* Great Eastern Railway Company	Law Rep. 10 Q. B. 437	428
Halley, The	Law Rep. 2 P. C. 193	524, 526
Hamilton *v.* Base	12 C. B. 631	345
Hampden *v.* Walsh	1 Q. B. D. 189	108
Hare *v.* Overseers of Putney	7 Q. B. D. 223	272

		PAGE
Harris *v.* Great Western Railway Company	1 Q. B. D. 515	183, 185, 187, 189
Hartnall *v.* Ryde Commissioners	4 B. & S. 361	121
Harvey *v.* Scott	11 Q. B. 92	451
Hayn *v.* Culliford	4 C. P. D. 182	527
Hayward *v.* Cruden	6 H. & N. 308	399
Heard *v.* Stamford	3 P. Wm. 409	129, 130
Hearn *v.* London and South Western Railway Company	10 Ex. 793	143, 145, 146, 147, 256
Hecker's Case	Year Book, 13 Hen. 8, f. 12, pl. 2, 14 Hen. 8, f. 2, pl. 2	411
Hegarty *v.* Shine	14 Cox Cr. C. 124, 145	413
Henderson *v.* Stevenson	Law Rep. 2 H. L., Sc. 470	182, 183 184, 188, 189
Hesketh *v.* Atherton Local Board	Law Rep. 9 Q. B. 4	311
Hext *v.* Gill	Law Rep. 7 Ch. 699	556, 568
Hibbert *v.* Carter	1 T. R. 745	372
Hill *v.* Fox	4 H. & N. 359	105
Hilton *v.* Lord Granville	5 Q. B. 701	561
Hodgson *v.* Local Board of Carlisle	8 E. & B. 116	271
Holgate *v.* Kay	1 C. & K. at p. 344	49
Horton *v.* Bott	2 H. & N. 249	459
Houldítch *v.* Donegall	2 Cl. F. at p. 477	300
Hudson *v.* Ede	Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412	242, 243, 245 247, 248, 249
Huguet's Case	29 L. T. (N.S) 41	514, 515
Hutchinson *v.* Glover	1 Q. B. D. 138	39, 40, 42, 43, 44, 466

I.

Ingham *v.* Primrose	7 C. B. (N.S.) 82	31

J.

Jackson *v.* Litchfield & Sons	8 Q. B. D. 474	440
——— *v.* North Eastern Railway Company	5 Ch. D. 844	115, 117, 118
Jarrett *v.* Dillon	1 East. 18	92
Jarvie *v.* Caledonian Railway Company	2 Scotch Sess. Cas. 4th Series, p. 623	254
Jenkins *v.* Bushby	35 L. J. (Ch.) 400	193, 195
Johann Friederich, The	1 Wm. Rob. 35	526, 545
Johnson *v.* Lansley	12 C. B. 468	109
——— *v.* Palmer	4 C. P. D. 250	476
Jones *v.* Harris	Law Rep. 7 Q. B. 157	92
——— *v.* Gough	3 Moo. P. C. (N.S.) 120	422
——— *v.* Monte Video Gas Company	5 Q. B. D. 556	466

K.

Kearon *v.* Pearson	7 H. & N. 386; 31 L. J. (Ex.) 1	242
Keir *v.* Leeman	9 Q. B. 371	572, 573, 576
Kelly *v.* Byles	13 Ch. D. 682	207
King *v.* Hawkesworth	4 Q. B. D. 371	505

		PAGE
Kingston's, Duchess of, Case	2 Sm. L. C. 784, 8th ed.	297
Kirby *v.* Biffen	8 Q. B. D. 195	582, 584
Kleinwort *v.* Shepard	28 L. J. (Q.B.) 147; 1 E. & E. 447	432
Knee, Ex parte	1 B. & P. N. R. 148	456
Knight *v.* Marquis of Waterford	2 Y. & C. (Ex.) 22	195

L.

Lancashire, Justices of, *v.* Cheetham	Law Rep. 3 Q. B. 14	270
——— *v.* Overseers of Stretford	7 E. B. & E. 225	271
Lawson *v.* Burness	1 H. & C. 396	242
Le Blanch *v.* Reuter's Telegram Company	1 Ex. D. 408	505
Lee Conservancy Board *v.* Button	12 Ch. D. 383	209
Lee *v.* Riley	34 L. J. (C.P.) 212	19
Leon, The	6 P. D. 148	537, 545
Leroux *v.* Brown	12 C. B. 801	405, 406
Lewis *v.* Great Western Railway Company	3 Q. B. D. 195	254, 255, 260, 262, 266
——— *v.* McKee	Law Rep. 4 Ex. 58	181
Lickbarrow *v.* Mason	1 Sm. L. C. 7th ed. p. 756	364, 369, 371, 372, 375, 376
Lincoln, Bishop of *v.* Wolforstan	3 Burr. 1504	410
Lind *v.* Isle of White Ferry Company	8 W. R. 540	197
Lloyd *v.* General Iron Screw Collier Company	3 H. & C. 284; 33 L. J. (Ex.) 269	522, 527, 531, 532, 542
Lloyd, Re	3 M. & G. 547	455
——— *v.* Guibert	Law Rep. 1 Q. B. 115	524, 540
Long *v.* Duff	2 B. & P. 209	525
London and North Western Railway Company *v.* Buckmaster	Law Rep. 10 Q. B. 70 in Ex. Ch. 444	328
Lowenthal, Ex parte. Lowenthal, In re	Law 9 Ch. 324	95, 96, 99
Lyell *v.* Kennedy	20 Ch. D. 484	459, 460, 461, 462, 463
Lynch *v.* Godwin	26 Solicitors' Journal, p. 509	105, 106
Lysaght *v.* Edwards	2 Ch. D. 499	496

M.

M. Moxham, The	1 P. D. 107; per Mellish L. J. at p. 111	524, 526, 536
Macawley *v.* Furness	Law Rep. 8 Q. B. 57	427
Mackenzie, Ex parte. Bent, Re	42 L. J. (Bankruptcy) 25	21, 93
McConnachie *v.* Great North of Scotland Ry. Co.	3 Scotch Sess. Cas. 4 Series, 72	255
McFadzen *v.* Mayor of Liverpool	Law Rep. 3 Ex. 279	460
McManus *v.* Lancashire and Yorkshire Ry. Co.	4 H. & N. 327; 28 L. J. (Ex.) 353	254, 255
Malton Board of Health *v.* Malton Manure Company	4 Ex. D. 302	139, 140, 141
Manchester *v.* St. Pancras	4 Q. B. D. 409	177
Mansell *v.* Feeney	2 J. & H. 320	196
Marcus *v.* General Steam Navigation Company	35 L. J. (N.S.) 353	210
Marrow *v.* Turkin	Cro. Eliz. 715	48

		PAGE
Martin, Ex parte	4 Q. B. D. 212	506
Matson *v.* Baird	3 App. Cas. 1082	359
——— *v.* Swift	8 Beav. 368	496
Maude *v.* Lowley	Law Rep. 9 C. P. 165; 43 L. J. (C.P.) 103	294
May *v.* Hawkins	11 Ex. 210	459
Mersey Docks and Harbour *v.* Cameron	11 H. L. C. 443	271, 273, 281
Mertens *v.* Haigh	3 De J. & S. 528	38, 42
Meyerstein *v.* Barber	Law Rep. 2 C. P. 38 at p. 51	368 376, 377
Milan, The	Lush 388	527, 537, 538, 545, 546
Miller *v.* Pilling	9 Q. B. D. 736	333, 334, 336
Minet *v.* Morgan	Law Rep. 8 Ch. 36	196
Minnehaha, The	Law Rep. 3 A. & E. 148	165
Mirehouse *v.* Rennell	8 Bing. 490	411
Mordaunt *v.* Benwell	19 Ch. D. 302	496
Morfee *v.* Novis	8 Q. B. D. 195	582, 584
Morier, Ex parte. Willis, In re	12 Ch. D. 491	26
Morritt *v.* North Eastern Railway Company	1 Q. B. D. 302	143
Morton *v.* Palmer	51 L. J. (Q.B.) 7	580
Murray *v.* Walters	Cr. & Ph. 114	38, 41, 42, 43, 466 467
Murphy *v.* Phillips	24 W. R. 647	60

N.

Naylor *v.* Palmer	8 Ex. 739; 10 Ex. 382	432
Ness *v.* Stephenson	9 Q. B. D. 245	580
Newall *v.* Telegraph Construction Company	Law Rep. 2 Eq. 756 at p. 762	195, 203
Newton *v.* Beresford	1 Young Ex. 377, at p. 381	195
Nunn *v.* Fabian	Law Rep. 1 Ch. 35	156, 157, 160

O.

Ochsenbein *v.* Papelier	Law Rep. 8 Ch. 695	297, 301
Oldham *v.* Ramsden	44 L. J. (C.P.) 309	106
Ohrloff *v.* Briscall. The Hélène	Law Rep. 1 P. C. 231	527
Owen *v.* Wynn	9 Ch. D. 29	194, 196

P.

Parker *v.* South Eastern Railway Company	2 C. P. D. 416	185, 186, 187, 188 189
Parker *v.* Wells	18 Ch. D. 477, at p. 485	165, 168, 463
Parsons *v.* St. Mathew, Bethnal Green	Law Rep. 3 C. P. 56	120
Paxton *v.* Douglas	19 Ves. 225	460
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473	254, 255, 264, 266
Perrin, Re	14 C. B. 420	285
Phillips *v.* Clark	2 C. B. (N.S.) 156; 26 L. J. (N.S.) C. P. 168	522, 527, 531, 542

		PAGE
Phillips *v.* Eyre	Law Rep. 6 Q. B. 1	524
——— *v.* Routh	Law Rep. 7 C. P. 287, at p. 288	164, 168
Piancini *v.* London and South Western Railway Company	18 C. B. 226	146
Pickard *v.* Bretz	5 H. & N. 9; 29 L. J. (Ex.) 18	92, 94
——— *v.* Marriage	1 Ex. D. 264	92, 94
Pigot *v.* Cubley	15 C. B. (N.S.) 701	364
Pimlico Tramway Company *v.* Greenwich	Law Rep. 9 Q. B. 9	329
Pothonier *v.* Dawson	Holt N. P. 383	367
Powell *v.* Hyde	5 E. & B. 607; 25 L. J. (Q.B.) 65	432
Prince of Wales *v.* Lambe	11 Beav. 213	195
Pye *v.* Butterfield	5 B. & S. 829	459
Pyke, Ex parte. Lisser, In re	8 Ch. D. 754	105, 106
Pyott *v.* St. John	Cr. Jac. I. 329	51, 53

R.

Read *v.* Edwards	34 L. J. (C.P.) 31	19
Reeves *v.* Capper	5 N. C. 140	364, 367
Reg. *v.* Anderson	Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12	79, 80, 81, 82, 83, 84, 85, 86
—— *v.* Birmingham	5 Q. B. 210; 13 L. J. (M.C.) 1	175
—— *v.* Boyes	1 B. & S. 311; 30 L. J. (Q.B.) 301	113
—— *v.* Bradford	Bell's C. C. 268	359
—— *v.* Chapman	2 C. & K. 846	96
—— *v.* Dayman	26 L. J. (M.C.) 128	396, 397
—— *v.* Dicken	14 Cox, C. C. 8	75
—— *v.* Greenhow, Inhabitants of	1 Q. B. D. 703	482
—— *v.* Holmes	22 L. J. (M.C.) 122	47
—— *v.* Keyn	2 Ex. D. 63	82
—— *v.* Leeds Union	4 Q. B. D. 323	173, 174, 177
—— *v.* Leicester	2 B. & C. 889	174
—— *v.* Lesley	1 Bell C. C. 220	83
—— *v.* Lewis	9 C. & P. 523	383, 384, 385, 386, 387
—— *v.* Local Government Board	2 Ir. Law Rep. 316	313
—— *v.* Manchester, Overseers of	3 E. & B. 336	271
—— *v.* Morrish	32 L. J. (M.C.) 245	329
—— *v.* Sattler	1 Dears & C. C. 525	81, 83
—— *v.* St. George	9 C. & P. 483	382, 383, 384, 385, 386, 387
—— *v.* St. George's Union	Law Rep. 7 Q. B. 90	583
—— *v.* St. Mary's Newington	4 Q. B. 581	177
—— *v.* St. Pancras Assessment Committee	2 Q. B. D. 581	328
—— *v.* Steel	2 Q. B. D. 37	379, 380
—— *v.* Weil	9 Q. B. D. 701	379
—— *v.* Worcestershire, Justices of	11 Ad. & E. 57	271
Reid *v.* Langlois	1 Mac. & G. 627	39, 42
Rennell *v.* Bishop of Lincoln	7 B. & C. 113, at p. 151	409
Repington *v.* Governors of Tamworth School	2 Wils. 150	409
Rex *v.* Adames	4 B. & Ad. 61	342, 344, 352, 354

		PAGE
Rex *v.* Allen	1 Mood C. C. 494; 7 C. & P. 664	79, 81, 82, 84, 86
—— *v.* Bleasby	3 B. & A. 377	176
—— *v.* Elliott	1 Leach C. C. 175	34
—— *v.* Everton	1 East, 526	176
—— *v.* Granville, Lord	9 B. & C. 188	344
—— *v.* Jemot	Cited Arch. C. Pl. 16th ed. 395	79, 82, 83, 84, 86
—— *v.* Much Cowarne	2 B. & Ad. 86	173, 174, 175, 177
—— *v.* Tomlinson	9 B. & C. 163, at p. 166	344
—— *v.* Saxmundham	Fort, 307, nom. Rex *v.* St. Giles in the Fields, Burr, S. C. 2	174
Richards *v.* Cullerne	7 Q. B. D. 623	508
Roberts *v.* Haines	6 E. & B. 643, in Ex. Ch.; 7 E. & B. 625	556
Robertson *v.* Howard	3 C. P. D. 280	517
Robinson *v.* Barton Local Board	21 Ch. D. 621	396
Rodoconachi *v.* Elliott	Law Rep. 8 C. P. 649	434
Rooth *v.* North Eastern Railway Company	Law Rep. 2 Ex. 173	255
Rosewarne *v.* Billing	15 C. B. (N.S.) 316; 33 L. J. (C.P.) 55	105, 106, 107
Routh *v.* Roublot	1 E. & E. 850; 28 L. J. (Q.B.) 240	94, 97, 98, 99, 100
Rowbotham *v.* Wilson	8 H. L. C. 348	555, 556, 558, 561 562, 564, 568
Rowley *v.* Adams	7 Beav. 548	496
Russell *v.* Devon, The Men of	2 T. R. 667	121, 122

S.

St. Mary's Arches, Exeter *v.* Manchester Overseers	31 L. J. (M.C.) 77	173, 175, 177
Sandys *v.* Small	3 Q. B. D. 449	520
Sankey Brook Coal Company *v.* Marsh	Law Rep. 6 Ex. 185	26
Saunders *v.* Crawford	9 Q. B. D. 612	220, 222, 223, 224, 225, 226, 227
Saunderson *v.* Piper	5 Bing. (N.C.) 431	33, 34, 35
Schibsby *v.* Westenholz	Law Rep. 6 Q. B. 155, 159	297, 298, 300
Schmidt *v.* Royal Mail Steamship Company	45 L. J. (Q.B.) 646	427, 429
Schofield, Ex parte. Firth, In re	6 Ch. D. 230	111
School Board of London, Ex parte. Murphy, In re	2 Q. B. D. 397	223, 225
Score *v.* Huggett	7 M. & G. 95; 14 L. J. (C.P.) 74	580
Scott *v.* Miller	28 L. J. (Ch.) 584	110, 460
Sharpe *v.* Birch	8 Q. B. D. 111	92
Shermanbury *v.* Bolney	Carth. 279	174
Showell *v.* Bowron	W. N. March 17, 1883, p. 50	468, 469, 470
Simons *v.* Great Western Railway Company	18 C. B. 805	255, 266
Simpson *v.* Clayton	4 Bing. (N.C.) 758	48
Smart *v.* Sandars	5 C. B. 895	107
Smith, In re	2 D. & L. 376	210
—— *v.* Beaufort (Duke of)	1 Hare, 507; on appeal, 1 Ph. 209	194

		PAGE
Smith & Co. *v.* West Derby Local Board	3 C. P. D. 423	120
—— *v.* Claxton	11 Madd. 484	495
—— *v.* Darby	Law Rep. 7 Q. B. 719	555, 556, 568
—— *v.* Haines	6 E. & B. 643; affirmed, 7 E. & B. 625	568
—— *v.* Overseers of St. Michael, Cambridge	3 E. & E. 383	583
Snell, In re	5 Ch. D. 815	210
Sneezum, In re. Davis, Ex parte	3 Ch. D. 463	25, 27, 29
Société Generale *v.* Metropolitan Bank	27 L. T. (N.S.) 849	31
South Eastern Railway Company *v.* Railway Commissioners	6 Q. B. D. 586	313
Stafford Election Petition	20 L. T. 237	292
Steele *v.* State Line Steamship Company	3 App. Cas. 72	523
Stephens v. Wall	Dyer, 282	409
Stevenson *v.* Lambard	2 East, 575	52, 53
Steward *v.* Blakeway	Law Rep. 6 Eq. 479; Law Rep. 4 Ch. 603	496, 497
Stewart *v.* Pacific Steamship Company	Law Rep. 8 Q. B. 88, 362	428
Sullivan *v.* Rivington	28 W. R. 372	335
Swan, Ex parte	7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113	31
—— *v.* North British Australasian Company	2 H. & C. 175; 31 L. J. (Ex.) 425	31
Sykes *v.* Brook	50 L. J. (Ch.) 744	336
—— *v.* Sykes	Law Rep. 4 C. P. 645	14

T.

Tapscott *v.* Balfour	Law Rep. 8 C. P. 46	242, 243
Taylor *v.* Haygarth	14 Sim. 8	496
—— *v.* Liverpool and Great Western Steam Company	Law Rep. 9 Q. B. 546	527
—— *v.* Rundell	Cr. & Ph. 104	38
Thomas *v.* Lane	2 Sumner, 1	82
Thompson *v.* Hakewell	35 L. J. (C.B.) 18	49
Thorogood *v.* Bryan	8 C. B. 115	525, 527, 545
Thursby *v.* Plant	1 Wm. Saund. at p. 40 n.	48
Titterton *v.* Cooper	9 Q. B. D. 473	26, 29
Thomas *v.* Luckett	5 C. B. 23; 17 L. J. (C.P.) 27	580
Torkington, Ex parte	Law Rep. 9 Ch. 298	95, 96
Townshend *v.* Overseers of Marylebone	Law Rep. 7 C. P. 143	88
Trotter *v.* Blake	2 Mod. 229	399
Tuckness *v.* Alexander	32 L. J. (Ch.) 794	423
Tuff *v.* Warman	2 C. B. (N.S.) 740; 5 C. B. (N.S.) 573	525
Tunbridge Wells Local Board *v.* Ackroyd	5 Ex. D. 199	311
Twyman *v.* Pickard	2 B. & Ald. 105	51, 52, 53
Tyne Improvement Commissioners *v.* Chirton	1 E. & E. 516; 28 L. J. (M.C.) 131	274

U.

Umfreville *v.* Johnson	Law Rep. 10 Ch. 580	14, 15, 16
United States of America *v.* McRae	Law Rep. 3 Ch. 79	460
——, The *v.* Hamilton	1 Mason, 152	81

V.

		PAGE
Van Toll *v.* South Eastern Railway Company	12 C. B. (N.S.) 75	180, 181
Verulam (Lord) *v.* Howard	7 Bing. 327	399
Vicary *v.* Great Northern Railway Company	9 Q. B. B. 198	457

W.

Waite *v.* North Eastern Railway Company	E. B. & E. 719	525
Wailburn *v.* Ingilby	1 M. & K. 61	38, 41, 42, 44
Walker's Case	Co. Rep. Part. III. 22 A. B.	50
Walker *v.* Denne	2 Ves. 170, 185	496
Wallace *v.* Dublin and Belfast Railway Company	Ir. Rep. 8 C. L. 341	146
Wallingford *v.* Mutual Society	5 App. Cas. 685	297
Walsh *v.* Bishop of London	Law Rep. 10 C. P. 518	410, 411
Ward *v.* Lloyd	7 Scott, N. R. 499	573, 575
Waterer *v.* Waterer	Law Rep. 15 Eq. 402	501
Watney *v.* Haslam	Unreported	413
Watson *v.* Great Western Railway Company	6 Q. B. D. 163	209
Webb *v.* East	5 Ex. D. 108	463
Wells *v.* Abrahams	7 Q. B. 554	413
—— *v.* Mitcham Gaslight Company	4 Ex. D. 1	208, 209
—— *v.* Wren	5 C. P. D. 546	292
West *v.* Lassels	Cro. Eliz. 851	48
Westwood *v.* Secretary for India	27 L. J. (N.S.) 736	402
White, Re	10 L. T. (O.S.) 349	455
——— *v.* Hindley	Law Rep. 10 Q. B. 219	119, 122, 123
——— *v.* Redfern	5 Q. B. D. 15	66, 67, 68
Williams *v.* Bayley	Law Rep. 1 H. L. 200	573, 574, 575, 576
——— *v.* Jones	13 M. & W. 628, at p. 633	300
Woodcock, Re	1 C. B. 437	285
Worcester, Corporation of *v.* Droitwich Assessment Committee	2 Ex. D. 49	271
Wright *v.* Marwood	7 Q. B. D. 62	427, 431
Wymer *v.* Dodds	11 Ch. D. 436	116
Young, Ex parte	19 Ch. D. 124	444, 476
——— *v.* Davis	7 H. & N. 760, p. 776	120
——— *v.* Grote	4 Bing. 253	31, 32

Z.

Zunz *v.* South Eastern Railway Company	Law Rep. 4 Q. B. 539	181, 182, 187, 190

MEMORANDUM.

OPENING OF THE ROYAL COURTS OF JUSTICE.

On Monday, the 4th of December, 1882, the Royal Courts of Justice were formally opened by Her Majesty the Queen, in the presence of a great and distinguished assembly, including a large number of members of the Bar, and of the Incorporated Law Society.

At the main entrance of the building the Queen was received by the Lord Chancellor (Lord Selborne), Her Majesty's Judges, the Attorney and Solicitor-General, the Prime Minister (Chancellor of the Exchequer), and the First Commissioner of Works (The Right Hon. George Shaw-Lefevre); and was joined by His Royal Highness the Prince of Wales (Bencher of the Middle Temple), His Royal Highness the Duke of Connaught (Bencher of Gray's Inn), His Royal Highness the Duke of Albany (Bencher of Lincoln's Inn), His Royal Highness the Prince Christian of Schleswig-Holstein (Bencher of the Inner Temple), and other members of the Royal family, who had awaited Her Majesty's arrival.

A procession having been formed, Her Majesty was conducted to a dais erected at the north end of the Hall, where the Secretary of State for the Home Department (The Right Hon. Sir W. G. Vernon-Harcourt) took his place at Her Majesty's right hand.

The First Commissioner of Works then offered to Her Majesty the key of the building in the following words:

"May it please your Majesty:—

"Your Commissioners of Works and Public Buildings have been charged with the erection of this building during the last

eight years. It is now complete. It falls upon me to announce to your Majesty that it is ready to be constituted as 'the certain place' in which, in accordance with the ancient laws of your kingdom, justice shall be administered in the future by your Majesty's Courts."

Her Majesty, having accepted the key, delivered it to the keeping of the Lord Chancellor, and spoke as follows:—

"My Lord Chancellor:—

"I deliver into your charge with this key the care of these Courts of Law. I trust that the uniting together in one place of the various branches of Judicature in this my Supreme Court will conduce to the more efficient and speedy administration of justice to my subjects, and I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

The Lord Chancellor received the key and, on behalf of himself and the Judges of England, thus addressed Her Majesty:—

"May it please your Majesty:—

"In the name and on behalf of the assembled Judges of your Majesty's Supreme Court of Judicature, I accept the charge which your Majesty has been pleased to lay upon me; and I ask permission to offer to your Majesty the humble expression of our loyal devotion to your Majesty's person and throne, and of our gratitude for the part which your Majesty has been graciously pleased to take in the solemnity of this day. This building, now complete, was authorized by your Majesty with the concurrence of Parliament, in the year 1865, and it has been in progress for more than eight years, under the hands of a great architect, to whom it has not been permitted to see this day. Your Majesty, whose strength of sympathy is so well known to us all, will, I am sure, share the feelings of your subjects when they think of those who are no longer with us—of the architect whom we have lost,

and of that good prelate, venerable as much for his wisdom and virtue as for his great office, from whose lips we might have hoped, not many months since, to hear the Divine blessing invoked upon us to-day. Man passes away, but his works remain. This building, we trust, will remain to a remote posterity, one of the most magnificent public works of the time in which we live. These Royal Courts of Justice, stately enough to satisfy even those who are most accustomed to Westminster Hall, will not, like Westminster Hall, recall the memories of Norman or Plantagenet, of Tudor or Stuart kings; but they will be for ever associated with the name of your Majesty, and with the glories of a reign happy, beyond all which have preceded it, in those qualities of the Sovereign which have caused your Majesty to be so universally beloved and revered, in the advancement of all the arts of civilization, and in the general peace and prosperity of the British people. Among the legislative improvements which have distinguished your Majesty's reign, not the least has been the consolidation and union of the several branches of the Supreme Judicature, which formerly exercised divided jurisdiction. To give full effect to that great change, it was necessary that the different Courts and offices should be brought together in one edifice, fit for the duties which they have to perform. This has at last been done; and your Majesty, by your gracious presence here to-day, has given a signal proof of your care for that justice which will here be administered in your name. It was, indeed, fitting, and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, and integrity, in the fear of God, and without fear

of man. That they, and their successors, may be enabled truly to do justice within these walls, as long as the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

The Archbishop of York offered up a prayer.

The Queen then declared the building open.

Her Majesty's State Trumpeters, stationed at the north end of the Hall, announced the event by a flourish of trumpets.

The Attorney-General, on behalf of the Bar of England, humbly prayed Her Majesty to direct that the proceedings should be entered upon the records of the Supreme Court.

The Queen, through The Lord Chancellor, signified her royal consent that "it should be done as prayed."

Addresses were then presented to Her Majesty by His Royal Highness the Prince of Wales, accompanied by the four Treasurers, on behalf of the Inns of Court; and by the Lord Chancellor, accompanied by the President of the Incorporated Law Society, on behalf of that society, and the proceedings terminated.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVI VICTORIA.

McGIFFIN (Executor, &c.) *v.* PALMER'S SHIPBUILDING AND IRON COMPANY, Limited. 1882 *Nov.* 14.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *subs.* 1 —*Defect in the Condition of Way—Obstruction.*

A workman was employed in the defendants' iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a roadway of iron plates. While he was so engaged the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway, and a ball fell on him, causing personal injuries from which he died. In an action against the employers:—

Held (by Field and Stephen, JJ.), that the obstruction caused by the substance projecting into the roadway was not a defect in the condition of the way within the meaning of the Employers' Liability Act, 1880, s. 1, subs. 1, and that the defendants were not liable.

This was a special case stated on appeal from the County Court of Durham.

The action was brought by the plaintiff as father and legal representative of Thomas McGiffin deceased, under the Employers'

5 2 9

1882

MoGIFFIN v. PALMER'S SHIPBUILDING Co.

Liability Act, 1880, to recover damages in respect of his death. The notice of action was that the injury was caused by reason of a defect in the condition of the path or way, which defect was not remedied, owing to the negligence of the defendants or their foreman puddler, who knew of the defect and was a person in the service of the defendants, and entrusted by them with the duty of seeing that the said path or way was in proper condition. (1) The facts material to the point decided in the case were as follows:—

The deceased worked at the defendants' iron rolling mills as an underhand puddler, and a part of his duty was to convey puddled iron, while still at white heat, to a steam hammer at a distance of about thirty yards from the furnace at which he worked. The iron was conveyed in portions called balls, upon a bogie or two wheeled car drawn by hand along a roadway or ironplates, part of which roadway was called the race. Part of the roadway was occupied on one side by boxes containing coals for the use of workmen at other furnaces than that at which the deceased was engaged, and on the other side of the race were deposited quantities of pig iron for replenishing the furnaces, and a substance called tap, which was used by the puddlers for lining the furnaces. The race when clear was sufficiently wide for the passage of the bogies. On the night of the 29th of September, a labourer in the employment of the defendants, but having no superintendence,

(1) The statute 43 & 44 Vict. c. 42, gives a right of compensation.

Sect. 1. "Where after the commencement of this Act, personal injury is caused to a workman:

(1.) By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence. . . ."

Sect. 2. "A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1.) Under subsection one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in a proper condition. . . ."

1882

McGIFFIN v. PALMER'S SHIPBUILDING CO.

in the course of his ordinary labour, placed several pieces of tap on a part of the roadway between the furnace at which the deceased worked and the steam hammer, and one of these pieces of tap was negligently deposited in front of the stack of pig iron, and projected at least eight inches into the race. After the tap had been placed as aforesaid, the deceased was running with his loaded bogie along the race from his furnace to the hammer, when the right hand wheel or axle of the bogie caught the projecting piece of tap and checked the speed of the bogie. The deceased fell, and the ball rolled on to him, inflicting such injuries that he afterwards died therefrom. The projecting tap might easily have been removed by one person in a few seconds if it was found to be an obstruction.

It was contended (among other things) on behalf of the defendants that the projecting piece of tap was not a defect in the condition of the ways used in the business of the defendants, within the meaning of s. 1, subs. 1 of the Employers' Liability Act, 1880, but was an obstruction placed there by the negligence of a fellow workman of the deceased.

One of the questions for the opinion of the Court was whether the aforesaid obstruction was such a defect. (1)

Strachan, for the defendants, contended that the expression "a defect in the condition of ways, works, machinery, or plant," must refer to something inherent in the subject-matter, and did not include anything, as in this case, not connected in any manner with the way, but merely placed on or added to it. In the present case there was no defect, but only an obstruction, and that is not within the Act.

A. Wills, Q.C. (*J. Edge*, with him), for the plaintiff, contended that when the tap was on the way so as to block it, there was a defect in the condition of the way, though there might be no defect in the way itself. An engine might be perfectly made and without defect, yet for want of oil there might be a defect in its

(1) The case raised a question under s. 1, subs. 2, and was remitted to the county court to determine whether the person, against whom negligence was charged in not keeping the way clear, came within the definition of a "person who has superintendence entrusted to him," in s. 8 of the Act.

1882

McGIFFIN v. PALMER'S SHIPBUILDING CO.

condition which might render it dangerous. Here the proper condition of the way was to be free from the obstruction which caused a defect in its condition.

Strachan, was not called on to reply.

FIELD, J. (after dealing with the other points in the case, continued): I think it is better that we should express our views upon sub-s. 1. The case for the plaintiff is that the deceased was engaged in his ordinary occupation as underhand puddler, of carrying a heated ball on the bogie from one part of the works to another, and that for the purpose of that operation there was a way provided. Some portion of the way was known as the race. That is the place on which the bogies run, and that race, it is perfectly plain, ought to be clear, and there the negligence on the part of anybody who has the superintendence and fails to keep that race clear would occur. But are we able to say that there was a "defect in the condition of the way?" Now, for the purpose of determining that, we must look at sub-s. 2 and the language of the Act of Parliament; and it seems to me that if Mr. Wills is right it would have been unnecessary to say anything about the negligence of people employed. It seems to me, that the legislature in using the word "way" means not a right of way, not the right to walk up and down on this race, but it means a thing—something which is the property of the employer which it is his duty to find and use, or which he does in any way use in the business. Here the word "way" means a material thing, which may be used within or used in connection with the business of the employer. It has been contended that there is a difference between "a way" and "the condition of a way," and illustrations have been given to bear out this contention. The case has been put of a way perfectly well constructed, but upon which on a frosty December morning water falls, so that it gets into a dangerous state. I cannot help thinking that that would be a defect in the condition of the way, because the way is the thing which people walk upon and the thing itself is actually altered. Taking the case of machinery, there the absence of oil does not, it seems to me, affect the permanent condition of the thing itself. Here the defect is not in the way, the defect is that

some person carelessly put something on the way which he ought not to have put there. This was an obstruction. In a grant of right of way, if such a case were brought forward, the declaration would not have been that the way was defective, but that it was obstructed. Actions are brought sometimes against railway companies for their stations being in a defective condition—out of repair—but if an action were brought against a railway company for leaving a bucket on a dark night in a dark passage, surely it would not be alleged that this constituted a defect in the way? It would be said that there was an obstruction put in the way. I cannot help thinking, therefore, that the construction to be put on sub-s. 1 is that the defect must be something in the permanent, or quasi-permanent condition. Therefore, without laying down any general rule, I think the present case does not fall within the section, and on this point the judgment will be reversed.

STEPHEN, J. I am of the same opinion. I will just say a word or two on what I understand by the difference between the way itself and the condition of the way. If you strike out the word "condition" and speak of a defect of the way, I think it is perfectly plain that would mean a hole in the road or stones forming part of the road which stick out, or something or other which actually injured the way, and which shewed that the way itself—the actual thing—was not suited for the purpose for which it was intended, and that would apply also to the works, and to the machinery and to the plant. A defect in the machinery would be the absence of some part of the machinery, or a crack, or anything of that kind. A defect in the condition of the way, or works, or machinery, or plant, is certainly wider, but I do not think it is very much wider. It means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word "condition" is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases, I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected.

1882

McGIFFIN v. PALMER'S SHIPBUILDING Co.

We are asked to go a step further, and Mr. Wills is obliged to contend that any obstruction whatever, although it did not alter the condition of the way in the sense which I have described, nevertheless would amount to a defect in the condition of the way. That seems to me to lead to the use of language which would certainly be very unnatural. Suppose for instance a drunken man staggering along the road, could that be called a defect in the condition of the way? and, if not, would it make any difference if he were lying down dead drunk? If such an obstruction is not a defect in the condition of the way I do not see why a piece of tap should be. I do not think we ought to put so wide a construction on the words "condition of the way" as to include obstacles lying upon the way, which obstacles do not in any degree alter the powers of the way or alter its fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it. It seems to me, therefore, that the presence of this piece of tap on the road cannot be called a defect in the condition of the way.

Case remitted.

Solicitor for plaintiff: *John Scaife, for Duncan & Duncan, South Shields.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co., for C. W. Newlands, South Shields.*

A. M.

KNIGHT *v.* ABBOTT, PAGE, & CO. 1882 Nov. 10.

County Court—Cause sent for Trial from Divisional Court—Action for Unliquidated Damages—Indorsement of amount of Claim upon Writ—19 & 20 *Vict. c.* 108, *s.* 26.

There is no power under 19 & 20 Vict. c. 108, s. 26, or the Judicature Act, 1875, to order an action for unliquidated damages to be tried in a county court, even where the writ is indorsed with a claim for a specified sum.

MOTION to rescind an order of North, J., in chambers.

In this action the writ was indorsed—The plaintiff's claim is 50*l.* under the defendant's undertaking in writing to repurchase from the plaintiff on the 1st of November, 1881, forty fully paid-up shares in Old Shepherds Mines, Limited, for 40*l.* at a premium of 5*s.* per share:

1882. Feb. 3.	To forty fully paid-up shares .	£40
	Premium	10
		£50

A summons having been taken out in chambers by the plaintiff for an order that the case should be tried in the county court under 19 & 20 Vict. c. 108, s. 26, the master dismissed the application, and on appeal North, J., affirmed the decision.

Bigham, for the plaintiff. The learned judge refused the order on the ground that the section applied only where the action is for a liquidated sum. The language is however large enough to include all cases of actions on contract where the amount indorsed does not exceed 50*l.* In *Guy* v. *Hinde* (1) it was held in Ireland upon similar words that an action of contract for unliquidated damages might be remitted to the Civil Bill Court. It must be admitted that the Common Law Procedure Acts do not make it necessary to indorse any particular amount in an action on contract for unliquidated damages, but assuming that the Judicature Acts (Order II. rule 1; Order III. r. 6; Judicature Act, 1875, Appendix A., Part II., s. 4) have made no alteration in this respect, it is nevertheless submitted that such an indorsement

(1) Ir. Rep. 5 C. L. 247.

1882

KNIGHT v. ABBOTT.

may be made, and if made is material, so that the plaintiff after going to the county court upon such an indorsement would not be entitled to increase his claim beyond the amount so indorsed. Where therefore the plaintiff in an action of contract for unliquidated damages chooses to indorse an amount not exceeding 50*l.*, there is no reason why s. 26 should not apply. Such actions are certainly within the mischief intended to be remedied.

Oppenheim, for the defendants, was not heard.

FIELD, J. I think that there was no jurisdiction to order this case to be tried in the county court, and that the order of North, J., must be affirmed. For the plaintiff it has been argued that this is an action of contract with a claim for 50*l.* indorsed on the writ, so that it was necessary for him to shew that the writ was indorsed within the meaning of s. 26. Now, at the date of this Act, the word "indorsed" could only mean specially indorsed under the Common Law Procedure Act, 1852. Before the Common Law Procedure Act, 1852, there was no such thing as the indorsement of the particulars of claim upon a writ, but this Act provided that where the claim is for a debt or liquidated demand in money arising upon a contract the plaintiff shall be at liberty to make a special indorsement of the particulars of his claim upon the writ. But as the indorsement under 19 & 20 Vict. c. 108, s. 26, is one which gives the amount of the claim, it is clear to my mind that this indorsement can only be in an action for a liquidated claim and not in one for damages. Then have the Judicature Acts made any difference? These Acts retain the specially indorsed writ under the Common Law Procedure Act, 1852, and extend the remedies upon it, and by Order II., rule 1, every action in the High Court is to be commenced by writ, which shall be indorsed with a statement of the nature of the claim made. Is this general indorsement within s. 26? If you look at the forms of indorsements of claims for damages in Appendix A., Part II., s. 4, you find that in none of them is the amount of the claim given, but curiously enough in the list of forms for money claims they insert the word "£———," shewing that it is here only that they require the amount to be specified. I think s. 26 is not merely a permissive, but a restrictive enactment, depriving the parties of the right

1882

KNIGHT v. ABBOTT.

to have the case tried in the county court, where the indorsement on the writ does not answer the description which is given.

STEPHEN, J. I am of the same opinion. I think there is no reason why the legislature should not have enabled a case like the present to be tried in the county court, but it has not conferred the power.

Order affirmed.

Solicitors for plaintiff: *Pritchard, Englefield, & Co.*
Solicitors for defendants: *Wilde, Browne, & Wilde.*

A. P. S.

D'HORMUSGEE & CO., AND ISAACS & CO. *v.* GREY.

1882
Nov. 20.

Practice—Security for Costs—Joint Plaintiffs, one residing Abroad—Joint and Separate Claims—Order XVI. r. 1.

An action was brought against the defendant as a common carrier by two plaintiffs, one residing abroad. The statement of claim alleged a contract by the defendant with the plaintiffs jointly, and in the alternative with each of the plaintiffs separately:—

Held, that the plaintiff residing abroad could not be ordered to give security for costs.

MOTION to rescind an order of Cave, J., which reversed an order of the master that the plaintiffs, D'Hormusgee & Co., should give security for costs.

It appeared that the first paragraph of the statement of claim alleged that the plaintiffs, D'Hormusgee & Co., were merchants at Bombay, and the plaintiffs Isaacs & Co., merchants in London, and the defendant a lighterman in London, and the second and third paragraphs that the plaintiffs delivered to the defendant as a common carrier 246 bales of cotton, which the defendant undertook to convey safely and securely to St. Katherine Dock, and that in breach of his undertaking he allowed them to become damaged by water. Fourth paragraph. "In the alternative the plaintiffs repeat the second and third paragraphs of the statement of claim, substituting for the word "plaintiffs" the words "the said Messrs. D'Hormusgee & Co.," and in the further alternative again repeat them, substituting for the word "plaintiffs" the words "the said Messrs. Isaacs & Co."

1882

D'HORMUSGEE v. GREY.

Bucknill, for the defendant. The plaintiff, D'Hormusgee, who resides abroad, ought to give security for costs. The statement of claim is so framed that he must be taken to have brought a separate action against the defendant. The power to claim jointly and separately is given by Order XVI., r. 1, which enacts that all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, and judgment given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief. This rule is taken from the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 19, and the right to costs which is given to the defendant is evidently confined to a joint claim properly so called, and does not extend to a case like the present, where though there is only one statement of claim, each plaintiff is really suing separately. It may be admitted that before the Common Law Procedure Acts, where there were co-plaintiffs and one resided abroad, an order was not made for security for costs. But now that Order XVI. has enabled separate claims to be added the Court will not allow the defendant to be made liable to pay the costs of the separate claim of the plaintiff in England, supposing that it is decided against the defendant, without being able to get his costs from the other plaintiff, whose separate claim may be unfounded. [He cited Wilson's Judicature Acts, 3rd ed. 226; Day's Common Law Procedure Acts, 4th ed. 419.]

Barnes, for the plaintiffs. An order for security for costs is not granted when one of the plaintiffs resides within the jurisdiction, and the fact that the plaintiff within the jurisdiction is insolvent makes no difference: *Sykes* v. *Sykes*. (1) Here one of the plaintiffs resides in London, is a party to the proceedings by which the other plaintiff is joined, and is liable to costs incurred by the failure of the separate claim put forward by the other plaintiff, for the whole statement of claim is a joint proceeding. This appears by *Umfreville* v. *Johnson* (2), where two owners of property joined

(1) Law Rep. 4 C. P. 645. (2) Law Rep. 10 Ch. 580.

in filing a bill for an injunction, and a decree was made for an injunction as regarded one plaintiff, and for the defendant to pay him his costs, the bill to be dismissed as regarded the other plaintiff, and the costs occasioned by the addition of the first plaintiff to be deducted from the costs so to be paid by the defendant. No hardship can arise. If the separate claim of the plaintiff in India fails, the defendant will get the costs from the other plaintiff. [He cited Daniell's Chancery Practice, p. 28.]

Bucknill, in reply. This is not a case of joining a co-plaintiff, but a new mode of bringing two separate actions.

DENMAN, J. I think that the order of Cave, J., was right. The whole statement of claim is the act and proceeding of the two plaintiffs, and in it they allege that the defendant as a common carrier made a bargain with them, and then repeat this allegation requesting the Court to substitute for the word "plaintiffs" the name of one plaintiff. This plaintiff is a foreigner residing out of the jurisdiction, while the other plaintiff resides in England. The question is whether the master was right or wrong in ordering the foreign plaintiff to give security for costs. I was at first impressed with the contention that the defendant might be ordered to pay the costs of the English plaintiff, and be unable to recover his own costs from the foreigner. But there can be no doubt that, by the law before the Judicature Acts, where one of two joint plaintiffs is a foreigner, out of the jurisdiction, yet if the other resides in England, there can be no order for security for costs. It is also clear from *Umfreville* v. *Johnson* (1) in the Chancery Division, that where an injunction is prayed for by two owners of separate properties, and is refused to one co-plaintiff and granted to the other, the successful plaintiff is liable to pay the costs of the other who is unsuccessful. This is a strong authority to shew that in a joint action the liability to costs is not limited by the separate interests of the co-plaintiffs. Therefore the question is reduced to this. Does Order XVI. r. 1, make any alteration in the practice as regards security for costs? I think that it does not. For the defendant it was argued that the rule only applies to cases where the

(1) Law Rep. 10 Ch. 580.

1882

D'HORMUSGEE v. GREY.

parties are suing jointly, and that the words "so joining" do not include cases where one plaintiff relies in the record upon a separate interest, but only cases where all sue in respect of a joint interest. But such a construction would be inconsistent with the first clause of the rule, which is to the effect that persons may be joined as plaintiffs in whom the right to relief is alleged to exist severally. Now here the "persons joining" are the persons who bring the action, who act by one solicitor, and who speak of themselves as "the plaintiffs," though they allege that each of them has a separate right. This is not a case in which a separate action is brought by either of them independently of the other, so as to warrant us in departing from the ordinary rule as to security for costs in the case of joint plaintiffs, one of whom resides abroad.

MANISTY, J. I am of the same opinion. It seems to me that the matter is clear upon the words of Order XVI. r. 1, quite irrespective of authority. This rule distinguishes between joining as plaintiffs and the right to relief which is alleged to exist. So that if an Englishman and a foreigner join as plaintiffs in an action alleging a right to exist in both, as was done here, or in the alternative in either of them severally, the two together are to be considered as the plaintiffs. The action goes on, the Englishman succeeds and the foreigner fails. How are the costs to be dealt with? The answer must be, judgment for the Englishman with costs. But the defendant is entitled to his costs "occasioned by so joining"—that is the plaintiffs joining—whom? Why the person who has been found to be not entitled to recover. That is the plaintiffs are each liable to these costs. *Umfreville* v. *Johnson* (1) seems precisely in point.

Judgment for the plaintiffs; order affirmed.

Solicitors for plaintiffs: *Waltons, Bubb & Walton.*
Solicitors for defendant: *J. A. and H. E. Farnfield.*

(1) Law Rep. 10 Ch. 580.

A. P. S.

TILLETT *v.* WARD. 1882
Nov. 27.

Trespass—Entry of Ox into Shop adjoining Street—Absence of Negligence—Liability.

An ox belonging to the defendant and while being driven by his servants through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved:—

Held, that the defendant was not liable.

APPEAL by special case from the decision of the judge of the county court of Lincolnshire, holden at Stamford.

The action was to recover 1*l.* for the damage done to goods in the plaintiff's shop.

It appeared that on the 15th of May, 1882, an ox of the defendant was being driven from a live-stock market in Broad Street, Stamford, along a public street called Ironmonger Street, to the defendant's premises. Ironmonger Street has a paved carriage road with a foot pavement on either side, and the plaintiff was the occupier of an ironmonger's shop in the street. The ox, after having gone for some distance down the paved carriage road of Ironmonger Street, driven by the defendant's men, went for a short distance upon the foot pavement on the near or left-hand side, and was driven therefrom by one of the drovers in charge on to the carriage road, and after continuing for a farther distance upon such carriage road, turned again on the pavement about twelve yards from the plaintiff's shop and continued upon the pavement until it came opposite the plaintiff's shop when it passed through the open doorway into the shop, and did damage to goods therein to the amount claimed. The ox was, as soon as possible after such entry and damage, driven by the defendant's men from the shop to the carriage road and to defendant's premises in another street, but they did not succeed in getting it out until about three-quarters of an hour from the time when it entered. No special act of negligence was proved on the part of the persons in charge of the ox, and there was no evidence that it was of a vicious or unruly nature, or that the defendant had any

1882

TILLETT v. WARD.

notice that there was anything exceptional in its temper or character, or that it would be unsafe to drive it through the public streets in the ordinary and usual way. It was proved that at the time the ox left the carriage way the second time one of the two men of the defendant in charge of the animal was walking by its side, having his hand upon it, and that the other man was walking about three yards in the rear of it. The two men in charge proved that they drove it unaccompanied by other cattle from the market, and they both declared that they did all they could under the circumstances to prevent it going on to the foot pavement and entering the open doorway of the plaintiff's shop, and they stated that the movement of the ox from the carriage way on to the foot pavement was sudden and could not by any reasonable or available means have been prevented. It was alleged by the defendant's witnesses, and not contradicted, that it was a usual thing for several oxen to be driven from the Stamford market in charge of two men and sometimes one man. It was admitted that it is not customary to drive oxen with halters, and that they would probably not go quietly if led by halters.

The county court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

The question for the opinion of the Court was whether, upon the facts, the plaintiff was entitled to the verdict.

Moon (*W. Graham*, with him), for the defendant. In the absence of any proof of negligence on the part of the drovers, the defendant is not responsible. In *Goodwyn* v. *Cheveley* (1), where the defendant's cattle escaped into the plaintiff's field, which was alongside the highway, through a gap in the fence, Bramwell, B., states the law to be that, where cattle go along the highway and there are no fences in the adjoining land, so that it is certain that the cattle will stray, this is a necessary evil which those whose lands border on the highway must sustain. This opinion is supported by the observation of Blackburn, J., in *Fletcher* v. *Rylands* (2), that "those who go on the highway or have their property adjacent to it may well be held to do so subject to their

(1) 28 L. J. (Ex.) 298. (2) Law Rep. 1 Ex. 265, at p. 286.

taking upon themselves the risk of injury from that inevitable danger." [He was stopped.]

Sills, for the plaintiff. First, it can be inferred from the facts stated, that the drovers might have prevented the accident, and were guilty of negligence. But assuming that there was no negligence the defendant is still responsible. The law on the subject of trespass by animals is stated by Williams, J., in *Cox* v. *Burbidge* (1),—that the owner of an animal, in which by law the right of property can exist, is bound to take care that it does not stray into the land of his neighbours, and if it does he is liable for the trespass and the ordinary consequences of the trespass, and that it is immaterial whether the animal escaped by reason of his negligence or in spite of his most diligent care. This ruling is followed in *Lee* v. *Riley* (2), and in *Read* v. *Edwards* (3); *Ellis* v. *Loftus Iron Company* (4) is also an authority to shew that if animals go upon the land of another this is a trespass without evidence of negligence, and that the owner must answer for any injury done by the animal. In *Goodwyn* v. *Cheveley* (5), the ruling of Bramwell, B., proceeds upon the assumption that the cattle got into the plaintiff's land owing to the defect of his fence. The only authority in favour of the defendant is the dictum of Blackburn, J., in *Fletcher* v. *Rylands*. (6)

[He cited Com. Dig. tit Trespass, C.; Blackstone, 16th ed. vol. iii. c. 12, p. 211.]

Moon, in reply.

LORD COLERIDGE, C.J. In this action the county court judge has found as a fact that there was no negligence on the part of the drivers of the ox, or, at all events, he has not found that there was negligence, and as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear as a general rule, that the owner of cattle and sheep is bound to keep them from trespassing on his neighbours' land, and if they so trespass an action for damages may be brought against him, irrespective of whether the trespass was or

(1) 32 L. J. (C.P.) 89, at p. 91.
(2) 34 L. J. (C.P.) 212.
(3) 34 L. J. (C.P.) 31.
(4) Law Rep. 10 C. P. 10.
(5) 28 L. J. (Ex.) 298.
(6) Law Rep. 1 Ex. 265.

(1) 5 C. & Jur. 45 971
(2) 5 C. & J. 45 527

1882

TILLETT v. WARD.

was not the result of his negligence. It is also tolerably clear that where both parties are upon the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action shew that the trespass was owing to the negligence of the other or of his servant. It is also clear, that where a man is injured by a fierce or vicious animal belonging to another, that prima facie no action can be brought without proof that the owner of the animal knew of its mischievous tendencies.

In the present case, the trespass, if there was any, was committed off the highway upon the plaintiff's close which immediately adjoined the highway, by an animal belonging to the defendant, which was being driven on the highway. No negligence is proved, and it would seem to follow from the law which I have previously stated, that the defendant is not responsible. We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss. This is shewn by the judgment of Bramwell, B., in *Goodwyn* v. *Cheveley*. (1) That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of Blackburn, J., in *Fletcher* v. *Rylands* (2), that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities, but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shewn, and the judgment of the county court judge must be reversed.

STEPHEN, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field it is his duty

(1) 28 L. J. (Ex.) 298.

(2) Law Rep. (1 Ex.) 265.

to keep them from trespassing on the land of his neighbours, but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn* v. *Cheveley* (1) seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn* v. *Cheveley* (1) a very reasonable one, for otherwise I cannot see how we could limit the liability of the owner of cattle for any sort of injury which could be traced to them.

Judgment for the defendant.

Solicitors for plaintiff: *Wright & Law.*
Solicitors for defendant: *Whyte, Collisson, & Prichard.*

(1) 28 L. J. (Ex.) 298.

A. P. S.

Applied. KITCHEN'S TRUSTEE *v.* MADDERS. [1949] 2 All E.R. 54.

Applied. KITCHEN'S TRUSTEE *v.* MADDERS. [1949] 1 Ch. 588

1882
Nov. 11.

ALLOWAY *v.* STEERE.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39—*Mutual Dealings—Set-off—Landlord and Tenant—Trustee in Bankruptcy—Non-disclaimer of Tenancy, effect of— Outgoing Tenant— Landlord's Right to Set off Rent accrued due before Bankruptcy against Trustee's Claim as outgoing Tenant for Tillages.*

A debtor, who was tenant from year to year of a farm upon the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages and cultivation according to the custom of the country, filed a petition for liquidation of his affairs under the Bankruptcy Act, 1869, and a trustee was appointed, who did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors until the tenancy was determined by notice to quit. The debtor's estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages and cultivation by the trustee during his tenancy, according to the custom:—

Held, that the landlord was not entitled to set off rent, accrued due from the debtor before the liquidation proceedings, against the trustee's claim.

SPECIAL CASE, stated in an action for the opinion of the Queen's Bench Division, and containing the following material facts:—

1. On and before the day next hereinafter mentioned, Thomas Webb was tenant from year to year to the defendant of a farm and land in the parish of Newdigate in the county of Surrey called "Cudworth Farm." The terms of the tenancy were not expressly agreed upon or mentioned, but the custom of the country required that Webb should during the tenancy till and cultivate the farm and land in a husbandlike manner, according to the custom of the country where the same were situate; and that the defendant, or other the landlord for the time being, should, at the expiration of the tenancy, pay to Webb, or other the person who should at the expiration of the tenancy be tenant of the farm and land, all such reasonable allowances as he, as offgoing tenant, should, according to the custom, be entitled to receive from the defendant, or other the landlord for the time being, in respect of any tillages, sowing, or cultivation by Webb, or other the tenant for the time being of the farm and land according to the custom, the benefit whereof should be given up to the defendant, or other the landlord for the time being.

2. On the 24th of September, 1879, Webb instituted proceedings under the Bankruptcy Act, 1869, in the prescribed manner, for liquidation of his affairs by arrangement or composition with his creditors, and thereupon the plaintiff was duly appointed receiver of Webb's property, of which he took immediate possession.

3. On the 14th of October, 1879, the statutory majority of Webb's creditors, duly assembled at the first general meeting in the matter of the said proceedings, in accordance with the provisions of the Act resolved that Webb's affairs should be liquidated by arrangement, and not in bankruptcy, and that the plaintiff should be, and he was, thereby appointed trustee, and that the persons in the resolution named should be, and they were, thereby appointed a committee of inspection, and the resolution was duly registered, and thereupon the tenancy of Webb became vested in the plaintiff, subject to the right of the plaintiff to disclaim the same pursuant to the provisions of the Bankruptcy Act, 1869.

4. The plaintiff, with the consent of the committee of inspection, elected not to disclaim the tenancy, but to carry on the business of the debtor, and to remain tenant to the defendant of, and to till and cultivate, the farm and land.

5. The plaintiff's tenancy duly expired on the 29th of September, 1880, by reason of the plaintiff having duly given to the defendant notice of his intention to quit and deliver up possession of the farm and land upon that day.

6. During the tenancy the plaintiff bestowed his work and labour in tilling, sowing, and cultivating the farm and land in a husbandlike manner, and according to the custom, and at the expiration of the tenancy, the benefit thereof was given up by the plaintiff to the defendant, and the plaintiff, as offgoing tenant, was then, according to the custom, entitled to receive from the defendant reasonable allowances in respect of the said tillages, sowing, and cultivation. The whole of the work, labour, and other farming expenses in respect of which the above allowances were payable, have been provided and paid by the plaintiff, as such trustee as aforesaid, out of monies received by him out of the estate, except two sums amounting to 115*l.* 11*s.* 6*d.*, of which sums, one was in respect of allowances for tillages, &c., bestowed

1882

ALLOWAY v. STEERE.

by Webb, and the other in respect of the growth of underwood during Webb's tenancy.

7. In pursuance of the custom in the 1st paragraph mentioned, the plaintiff and defendant each appointed a valuer on his behalf, and the valuers appointed an umpire for the purpose of determining how much the plaintiff was entitled to receive from the defendant under the custom in respect of the said tillages, sowing, and cultivation or otherwise, and the valuers having disagreed, the umpire valued the same at the sum of 785*l.* 1*s.* 2*d.*

11. The defendant admits that the valuation was properly made and is binding on him, but seeks to reduce his liability to the plaintiff in respect of the said matters by the set-off or counterclaim hereinafter appearing.

13. Webb, at the time of the registration of the said liquidation resolution, was indebted to the defendant in the sum of 300*l.*, for two years' rent in arrear of the farm and land, which accrued due, as to one year's rent amounting to 150*l.* on the 29th of September, 1878, and as to the other year's rent, amounting to 150*l.*, on the 29th of September, 1879.

14. Rent to the amount of 150*l.*, being one year's rent (which accrued due on the 29th day of September, 1880), in respect of the tenancy of the said farm and land by the plaintiff has accrued due since the liquidation, and is still due and owing. The plaintiff is and always has been willing, and has frequently offered, to the defendant, to set off such sum against his claim.

15. The plaintiff has in hand, after certain payments made by him, the sum of 1020*l.* as against which he is liable to his solicitor for the costs of the liquidation and of this action, and he is entitled to certain charges, expenses, and remuneration as receiver and as trustee, and he may, in the event of being unsuccessful in the future prosecution of this action, be liable for the defendant's costs thereof, and so far as the plaintiff is at present able to judge, he believes that the said sum of 1020*l.* is sufficient to indemnify him against all liabilities undertaken by him in respect of the tenancy of the said farm and lands, and otherwise in respect of the estate of the liquidating debtor, or his office as trustee thereof, and he has no personal interest in the present action, other than his personal liability to pay costs therein.

The question for the opinion of the Court is:

Whether the defendant is, under the circumstances hereinbefore appearing, entitled to set off against the claim of the plaintiff the said rent, amounting to 450*l.*, or any and what part thereof. (1)

Nov. 10. *R. V. Williams*, for the defendant. The defendant is entitled to the set-off he claims. The respective claims of the landlord and trustee arise out of "mutual dealings" between them within s. 39 of the Bankruptcy Act, 1869. If the contract had been other than with respect to the tenancy of land no doubt could arise as to the right of set-off. Sect. 31 has so enlarged the right of proof against the debtor's estate that all claims arising out of a contract with the debtor are provable debts, and breaches of contract arising after, as well as before, the bankruptcy are the subject of proof: *In re Sneezum, Ex parte Davis.* (2) It is submitted that the principle of that case applies to a contract of tenancy. The landlord's claim for rent, and the trustee's claim for tillages, both arise out of the same contract here; the landlord could prove against the debtor's estate for rent accrued due after the bankruptcy, and he is entitled to set-off against the trustee's claim any provable debt arising out of the same contract, whether it arises before or after the bankruptcy. By not disclaiming the trustee becomes an assignee of the contract as well as of the estate. It is admitted that the trustee, where he does not disclaim, is personally liable to the landlord for the rent, and that if the debtor's estate were not sufficient to indemnify him, so that he might be compelled to pay rent out of his own pocket, it might well be said that the landlord's claim for rent which accrued due before the bankruptcy, and the trustee's claim for tillages at the expiration of his tenancy, were not claims in the same right, and therefore could not be the subject of set-off. But in dealing with questions of set-off, whether arising under statutes relating to solvent persons, or under the mutual credit clauses of the Bankruptcy Act, the Courts have always

(1) By consent of counsel on both sides the opinion of the Court was only desired in respect of the two years' arrears of rent, amounting to 300*l.*, which had accrued due from Webb to the defendant before the commencement of the liquidation proceedings.

(2) 3 Ch. D. 463.

1882

ALLOWAY v. STEERE.

looked at the real equitable interests of the parties: *Agra and Masterman's Bank, Limited* v. *Leighton* (1); *Bailey* v. *Johnson.* (2) In the present case the statments of fact contained in par. 15 of the case shew that no personal liability or beneficial personal interest in respect of the tenancy could accrue to the plaintiff. The claims are therefore really cross claims affecting the debtor's estate only. It is against equity that the trustee should be entitled to get the benefit of the tenancy by obtaining these allowances for tillages from the landlord, and the landlord should not be entitled to deduct the rent due from the debtor under the contract of tenancy.

Grantham, Q.C. (*R. Burleigh Muir,* with him), for the plaintiff. No case of "mutual dealings" entitling the landlord to the set-off claimed has been made out. In *Titterton* v. *Cooper* (3), Brett, L.J., expressly points out the distinction between an executory mercantile contract, and a lease or tenancy of land, where the trustee, as assignee, has a personal liability to the landlord in respect of his privity of estate. The respective claims of the landlord and trustee are not for debts due from or to the debtor's estate in the same right. The trustee by not disclaiming became personally liable for the performance of the conditions of the tenancy as a new tenant, and the landlord got the value of the tillages as a consideration for the monies he had to pay the trustee as tenant upon the determination of the tenancy. There is no right of equitable set-off. *The Sankey Brook Coal Co.* v. *Marsh* (4), and *Ex parte Morier, In re Willis, Percival, & Co.* (5)

R. V. Williams, replied.

Cur. adv. vult.

Nov. 11. DENMAN, J. In this case we took time until this morning to consider the questions raised. I have arrived at the conclusion that Mr. Williams' ingenious contention is unsupported by any authority, statute, or principle of law. Upon the liquidation proceedings being instituted, Webb's tenancy became vested in the plaintiff as trustee. The plaintiff's tenancy

(1) Law Rep. 2 Ex. 56.
(2) Law Rep. 6 Ex. 279.
(3) 9 Q. B. D. 473.
(4) Law Rep. 6 Ex. 185.
(5) 12 Ch. D. 491.

1882

ALLOWAY v. STEERE.

expired on the 29th of September, 1880, and reasonable allowances in respect of tillages and cultivation then became due to him from the defendant, the landlord of the premises. The amount has been ascertained by the valuers, and agreed to by the parties. It is admitted that the only question for our decision is whether under the statute, or by virtue of some equitable principle, the defendant can set-off against the plaintiff's claim the rent which was due from Webb at the date of the liquidation. Now I can find nothing in s. 39 of the Bankruptcy Act, 1869, which would include this case. It is too clear for argument that the words of the section do not expressly apply to such a case. Mr. Williams contends that by analogy to the case of *In re Sneezum, Ex parte Davis* (1), and according to the principle there laid down, this set-off ought to be allowed. He also contends that it is inequitable that the plaintiff, as tenant of the farm, and getting the benefit of the allowances in respect of tillages, should also be allowed to get the benefit of non-payment of rent, by which non-payment he was enabled to carry on the business of the farm and become entitled to the allowances. In the first place, I fail to see any analogy between the case of *In re Sneezum, Ex parte Davis* (1), and the present. In that case the question was not as to the right of set-off, but as to the right of proof—a wholly different thing. There may be a right here on the part of the landlord to prove for his rent, but that fact creates no analogy between the cases. No case has gone the length of deciding that where the trustee takes to a lease or tenancy, and carries on the business of the farm, and becomes entitled to get from the landlord a return of monies which have been expended for the benefit of the farm, the landlord shall have, not only his right of proof against the debtor's estate, but shall also be entitled to set-off against monies actually expended by the trustee in tillage and cultivation, of which the landlord gains the benefit, sums due from the debtor for rent accruing before the commencement of the trustee's interest. As to the contention that it would be against equity not to allow the set-off claimed by the plaintiff, I cannot see any analogy, connection, or privity between these two things, viz., the rent due before the liquidation, and the

(1) 3 Ch. D. 463.

1882

ALLOWAY v. STEERE.

trustee's claim in respect of tillages. The rent is due when the trustee enters, and he enters for the benefit of the debtor's estate. The result may be either a profit or a loss, but according to the custom of the country he is entitled upon the determination of the tenancy to be reimbursed the sums laid out for the benefit of the farm. I cannot see that there is one continuing contract of tenancy, out of which both the claims arise, as was contended; nor can I see any such mutual dealings as the statute contemplates. There is no case which decides the exact question here, and there is certainly no case to shew that any other than the ordinary principles of law or of equity with respect to set-off apply to the circumstances of the present case. I may add, that if the question in this case turned upon whether the trustee had a personal interest or liability in the matter, or was merely acting for the benefit of the estate, I should agree with Mr. Williams that we ought to hold on the facts stated in par. 15 of the case, that he had no such personal interest. But I do not think that question is material for the decision of the case. I am of opinion that the defendant is not entitled to the set-off he claims, either under the statute, or upon principle.

MANISTY, J. I have arrived at the same conclusion. When the facts are looked at, and the relative position and rights and liabilities of the parties taken into consideration, the case is not difficult. [His Lordship stated the facts.] When the plaintiff was appointed trustee, Webb's tenancy to the defendant had been determined by the liquidation proceedings, and it was open to the trustee to disclaim the tenancy or not—one of the consequences of the liquidation proceedings being that the term vested in him. At the date of the bankruptcy a breach of one of the conditions of the contract of tenancy, viz., to pay rent, had been committed; and the landlord could no longer sue Webb in respect of that breach, but was entitled to distrain for one year's rent, or to prove against the estate for the amount of the rent in arrear. Now, what was the relative position, and what were the rights and liabilities of the landlord and the trustee when the latter determined not to disclaim? It was admitted by the defendant's counsel that the plaintiff would be personally liable to perform the contract to

1882

ALLOWAY v. STEERE.

pay rent to the landlord, and I agree that that admission is a serious difficulty in the defendant's way. The relative rights and liabilities of the landlord and the trustee appear clearly from the case of *Titterton* v. *Cooper* (1), where the whole question was fully considered, and the conclusion arrived at by the Court of Appeal was that a trustee in bankruptcy, not disclaiming, was in the position of an ordinary assignee of the lease, and as such liable for the rent, and for the performance of the covenants during the time the lease was vested in him. No one could suggest that an ordinary assignee could be made liable for breaches of covenant, or of the contract of tenancy, which occurred before the assignment to him, and the breach of contract in respect of which the landlord claims a set-off in the present case is such a breach. Supposing it had been the case of an ordinary assignment; the assignee of the tenancy is bound under his contract to go on spending money on the farm, of which the landlord obtains the benefit; on what principle could it be said that when the tenancy comes to an end the landlord has a right of equitable set-off in respect of rent accrued due before the assignment, or in respect of damages for breach of covenant or contract accruing before the assignment? The statute has made no provision that there should be any such right of set-off in the case of bankruptcy, and I cannot see upon any principle or authority how the defendant's claim to a set-off can be supported; the plaintiff being, as I have said, in the same position as any other assignee. I understood the argument for the defendant to be that the contract of tenancy was a continuing contract, which, if the trustee did not disclaim, he took for better or worse, and he must as a consequence be held liable for all breaches occurring before the liquidation. That appears to me a proposition for which there is no authority. I agree with my brother Denman that *In re Sneezum, Ex parte Davis* (2), has no application here. That case is commented upon in *Titterton* v. *Cooper* (1), and Brett, L.J., in his judgment, expressly distinguishes the covenants in a lease from executory mercantile contracts. The present is simply the case of an assignee claiming, as assignee, to be repaid for tillages according to the custom of the country.

(1) 9 Q. B. D. 473. (2) 3 Ch. D. 463.

1882

ALLOWAY
v.
STEERE.

The landlord, therefore, could not be entitled to a set-off in respect of breaches of contract committed before the assignment.

Judgment for the plaintiff.

Solicitor for plaintiff: *Morrison, for G. C. Morrison, Reigate.*

Solicitors for defendant: *Duncan, Warren, & Gardner, for Hart, Hart, & Martin, Dorking.*

W. A.

1882

Nov. 2.

GARRARD AND ANOTHER *v.* LEWIS.

Bill of Exchange — Acceptance in Blank — Effect of Figures in Margin — Fraudulent Alteration of Figures—Negligence.

The defendant signed an acceptance, the amount in the body of which was then left in blank, but in the margin of which were the figures 14*l.* 0*s.* 6*d.*, that being the sum for which the defendant desired to accept. He then handed the acceptance to the drawer, who subsequently filled in the blank in the body of the bill for 164*l.* 0*s.* 6*d.* and fraudulently altered the figures in the margin to that sum. The bill was then indorsed by the drawer to the plaintiffs, who took it bonâ fide for value for the larger amount:—

Held, that the defendant was liable on the bill for such larger amount, on the grounds that the marginal figures are not an essential part of a bill of exchange; that one who gives an acceptance in blank holds out the person he entrusts therewith as having authority to fill in the bill as he pleases within the limits of the stamp; and that no alteration (even if it be fraudulent and unauthorised) of the marginal figures can vitiate the bill as a bill for the full amount inserted in the body when it reaches the hands of a holder for value who is unaware that the marginal figures have been improperly altered.

FURTHER CONSIDERATION, before Bowen, J. The facts sufficiently appear from the judgment.

April 29. *Charles, Q.C.*, and *Poole* for the plaintiffs. There was no alteration of the bill after its issue as a complete bill. The instrument when it left the hands of the defendant was a blank acceptance. The figures in the margin only amount to an instruction to an agent, which the agent did not follow. They form no operative part of the bill itself. It is well settled that, if the words in the body of the bill differ from the figures in the margin, the body of the bill must be looked to. The instrument could not have been sued on without insertion of an amount in

1882

GARRARD v. LEWIS.

the body of it, a consideration which shews conclusively that it was a blank acceptance when handed to the drawer.

Secondly, the defendant is estopped from denying that the bill was accepted by him in its present state by reason of negligence. He entrusted the acceptance to the drawer in such a state as to admit of its being dealt with as it has been without the possibility of a bonâ fide indorsee's detecting the fraud. He therefore gave the opportunity for this fraud, and ought to suffer rather than the innocent holder for value.

[They cited *Ingham* v. *Primrose* (1); *Young* v. *Grote* (2); *Ex parte Swan* (3); *Swan* v. *North British Australasian Co.* (4); *Société Generale* v. *Metropolitan Bank* (5); Mason on Bills of Exchange, 41, 42; *Baxendale* v. *Bennet.* (6)]

Bucknill, for the defendant. This instrument, when handed to the drawer, was not an acceptance in blank. It is contended that it might, without any amount having been inserted in the body, have been sued on as a bill of exchange. It is not necessary that the amount should appear in words. The instrument was an acceptance only for the sum in the margin. Therefore there was an alteration which avoided the instrument.

Secondly, with regard to the suggestion of negligence. It cannot be that in every case where it is possible to alter a bill fraudulently the acceptor is bound by the bill as altered. The acceptor is not bound to contemplate a forgery. There can only be negligence where there is a breach of some duty. What duty was there in this case towards the plaintiffs?

Charles, Q.C., in reply.

Cur. adv. vult.

Nov. 2. BOWEN, L.J. (7) This was an action by the indorsees of a bill of exchange against the acceptor, tried by consent before myself without a jury.

The first ground of defence, that the acceptor's signature was itself a forgery, was abandoned at the trial. It remains for me

(1) 7 C. B. (N.S.) 82.
(2) 4 Bing. 253.
(3) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.
(4) 2 H. & C. 175; 31 L. J. (Ex.) 425.
(5) 27 L. T. (N.S.) 849.
(6) 3 Q. B. D. 525.
(7) In the interval between the argument and the judgment his Lordship had been appointed a Judge of the Court of Appeal.

1882

GARRARD v. LEWIS.

to consider the second defence put forward, viz., that the bill after issue was altered in a material part.

The bill of exchange in question had been drawn by one Sidney Bees, four months after date, on the defendant; at the time when the defendant appended his signature to the document the sum to be mentioned in the body of the bill was left in blank, but in the margin of the bill were the figures 14*l.* 0*s.* 6*d.*, which was the sum for which the defendant desired to accept. Bees subsequently filled in the blank in the body of the bill for 164*l.* 0*s.* 6*d.*, and fraudulently altered the figures in the margin to that sum. Having done so, he indorsed the bill to the plaintiffs, who took it as bonâ fide holders for value for the larger amount.

It was contended before me on the part of the plaintiffs that the document at the time it was handed to Bees was, in spite of the marginal figures, an acceptance in blank, which did not issue as a bill till after the body of the bill had been filled in, and that the alteration of the marginal figures was not an alteration after but before or at the time of issue. Secondly, the plaintiffs' counsel maintained that the defendant on account of his own negligence was precluded as against a bonâ fide holder for value from disputing what Bees had done. From the view I take of this case it is unnecessary for me to examine or refer to the series of cases cited before me, beginning with *Young* v. *Grote* (1), which deal with the question of negligence as applied to negotiable instruments.

It is however necessary that I should state what in my view was the character of the document when handed by the defendant in blank to Bees, and for this purpose to consider what is the exact import and effect of marginal figures at the head of a bill of exchange. They do not seem in general to have been considered among merchants as of the same effect and value as the mention of the sum contained in the body of the bill. The history of these marginal figures may perhaps be shortly summarized as follows:—The first model of a bill of exchange preserved to us, and which dates from 1381, does not, I believe, possess them, though it does possess the votum or invocation with which merchants' bills used generally to commence, and which usually pre-

(1) 4 Bing. 253.

ceded the figures. The marginal figure at the head of a bill, which has since become a matter of common usage, was probably added at a very early date, in order that the amount of the bill might strike the eye immediately, and was in fact a note, index, or summary of the contents of the bill which followed (So; Nouguier, Lettres de Change, ed. 1875, p. 127; "Les Chiffres ne sont que pour simple note.")

Heineccius, who treats such marginal figures as part of the lemma or heading, does not speak of them as an essential part of the bill, and the fact that by the law of some countries the amount of the bill was necessarily repeated both in figures and in words is adduced by him as a reason for this view (ed. A.D. 1769, cap. IV. s. 5. See also cap. IV. s. 12). "Denique sollemne etiam est campsoribus sub finem lemmatis cifris exprimere summam solvendam, addito monetæ genere, quo exactori sit satisfaciendum: quamvis hoc requisitum vel ideo essentiale dici nequeat, quod summa in ipsis litteris cambialibus bis exprimi solet.

"Hoc requisitum non esse essentiale vel inde patet, quod ipse acceptans hanc summam supplere potest, quum tamen debitor sine falsi crimine in ipsa obligatione nihil mutare possit. *Adiicitur ergo summa magis notitiæ, quam necessitatis, caussa.*"

Marius, the first English writer on the subject (2nd ed. A.D. 1655, p. 34) in explaining that the words in the body are in case of difference to govern adds: "The figures at the top of the bill do only as it were serve as the contents of the bill and a *breviat thereof*, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereto special regard ought to be had." The substance of this passage is reproduced by Beawes, s. 193. Story (Bills of Exchange, s. 42) deals with the matter as follows: "The sum is sometimes *also* expressed in figures in the superscription as well as in the body of the instrument in letters for greater caution. But if the sum in figures on the superscription differs from the sum in words in the body of the instrument the letters will be deemed to be the sum."

This view has received judicial sanction in the case of *Saunderson* v. *Piper* (1), where a bill containing 245*l.* as a marginal figure

(1) 5 Bing. (N.C.) 431.

1882

GARRARD v. LEWIS.

but "two hundred pounds" in the body of the bill in words was held to be a bill for the latter sum. The case of *R.* v. *Elliott* (1) is distinguished and explained by Tindal, C.J., in *Saunderson* v. *Piper*. (2) Let us now apply the above proposition to the case of a document like the present, signed originally in blank with a marginal figure or index which has since been improperly altered.

A document, which contains such a marginal index, but in which a blank is left by the acceptor to be filled in with the dominant and all important statement in the body of the bill defining the amount for which it is accepted, is not a perfect bill till this dominant portion of the bill has been filled in. The document is not invalid simply because it is incomplete. It creates certain rights and obligations just as a blank acceptance does.

But, as the blank is presumably intended to be filled with something, the document, till this "something" has been added, is not complete. Nor is the question merely what is the actual limit of authority conferred by the acceptance in blank of such a document on the person to whom the acceptor hands it, but, rather, what authority the acceptor by his conduct holds out that person as possessing when his bill has reached the hands of innocent holders who do not know that the actual authority conferred is a limited one only.

Let me assume first a case in which no marginal figure exists at all, but in which a blank acceptance is left to be filled in, but which is subsequently filled in with a sum in the body of the bill larger than that which the acceptor has actually directed.

It is plain, I think, that in the hands of a bonâ fide holder for value without notice, a bill so filled in binds the acceptor to the full amount.

Next, let me assume a case of a similar excess of authority where, however, a marginal index exists on the bill for a smaller sum than that which has been subsequently placed in the body of the bill.

Is the apparent and ostensible authority of the drawer to whom the acceptance was intrusted in blank necessarily limited by the figure in the margin when the holder of the bill is acting inno-

(1) 1 Leach C. C. 175. (2) 5 Bing. (N.C.) 431.

cently and in good faith? I think not. For it is conceivable that, after the bill was signed in its original form, the acceptor may have changed his mind, and authorized the drawer to disregard the index and to fill in the body of the bill with a larger amount. If the acceptor had in fact authorized this to be done, surely he could not, as against a subsequent holder, deny that the bill for the larger amount inserted by his express direction was his bill simply because the marginal figure had been left unchanged: *Saunderson* v. *Piper* (1) seems to shew this much at all events.

Yet, if the holder in the absence of notice would have a right to neglect the marginal figure if it remained unaltered, and to look only to the body of the bill, it would seem next to follow that, even if the marginal figure was altered, the holder would have a right in the absence of notice to assume it was altered properly. The holder's right to look to the body of the bill would not be affected by such alteration, if he did not know the alteration was improper. A fortiori, his right to look to the body of the bill would remain the same when he did not know that the marginal figure had undergone any alteration at all.

I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is entrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered.

For these reasons the plaintiffs in this case would seem to be entitled to succeed, and judgment must be entered for them with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co., for Beckingham.*

Solicitors for defendant: *Crowder, Anstie, & Vizard, for Davis.*

(1) 5 Bing. (N.C.) 431.

E. L.

1882.
Nov. 11.

KEARSLEY *v.* PHILIPS, AND ANOTHER.

Practice—Production of Documents—Joint Possession—Joint Tenancy—Documents of Title.

In an action for the seizure of the goods of the plaintiff on certain premises which was justified by the defendants under an alleged power of distress in a mortgage deed, the defendant stated in his affidavit of documents that he and one B. jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and the said B. to the premises as mortgagees thereof. The affidavit further stated that the defendant objected to produce such documents. B. was no party to the action:—

Held, that such affidavit shewed sufficient reason for not making an order for inspection of the documents.

Murray v. *Walter* (Cr. & Ph. 114) followed. *Walburn* v. *Ingilby* (1 My. & K. 61) and *Hutchinson* v. *Glover* (1 Q. B. D. 138) discussed.

Affirmed on appeal 49 L.T.

APPEAL from the decision of North, J., refusing to order inspection of documents. The facts were as follows:—The action was against two defendants, Philips and Ducane. The statement of claim stated that one King was tenant of certain premises, and had given a bill of sale of his goods on such premises to the plaintiff, and complained of a wrongful seizure of the goods so conveyed to the plaintiff on such premises. The defendants, in their statement of defence, justified the seizure of the goods as mortgagees of the premises under a power of distress contained in a mortgage deed, by which deed the mortgagor, the lessor of King, had attorned to them as tenant of the premises at a yearly rent by way of securing the interest on the mortgage debt.

It appeared that the defendants were trustees of the sum secured by the mortgage, and that since the distress Ducane had retired from the trust, and one Blathwayt had been appointed trustee in his place.

In the defendant Philips' affidavit of documents, he stated (inter alia) that he and Blathwayt jointly had in their possession or power the documents mentioned in the second schedule to such affidavit; that the said documents were the muniments of title of himself and the said Blathwayt to the premises beforementioned as mortgagees thereof, the mortgage to himself and

Ducane having been transferred to himself and Blathwayt as trustee of the sum secured by the mortgage in the place of Ducane, and that he (Philips) objected to produce these documents. The second schedule specified the original lease of the mortgaged premises to the mortgagor, and the deeds of mortgage and transfer of the mortgage.

The affidavit of the defendant Ducane stated that the documents had been in the possession of the solicitors or agents of himself and the defendant Philips jointly, but that they were now no longer in such possession, but were, as he believed, in the possession of the solicitors of the defendant Philips.

The plaintiff applied at chambers for an order for inspection of these documents which was refused by the master. North, J., on appeal, affirmed the decision of the master. (1)

(1) The learned judge made a note of the grounds of his judgment in writing, which was read during the argument, and was as follows:—

"The passage in Seton on Decrees, 152, seems to me incorrect. *Taylor* v. *Rundell* (Cr. & Ph. 104) was a case of discovery, not production, and the decision is expressly based upon that. In *Mertens* v. *Haigh* (3 De G. J. & Smith, 528) the documents in question were in the possession of the defendant's own agent, and therefore he was bound to produce them, and could not escape doing so, unless he shewed that he had done all he could to enable him to do so, including the making of all necessary inquiries from his own agents. *Bovill* v. *Cowan* (Law Rep. 5 Ch. 495) does not affect the present case. The present case is governed by *Murray* v. *Walker* (Cr. & Ph. 114) in which it does not appear that the defendant had taken any steps to get the leave of the person who had the joint custody of the documents desired to be produced, and yet it was held that he was not bound and could not be compelled to produce them. In the present case the joint and material interest of Blathwayt in the documents in the second schedule is clearly shewn. The case of *Hadley* v. *McDougall* (Law. Rep. 7 Ch. App. 312) shews the course which the plaintiff can, if so advised, adopt in the present case. In *Hutchinson* v. *Glover* (1 Q. B. D. 138) the document ordered to be produced was in the exclusive possession of the defendants, and the order for production was made of course, though other parties might have an interest in it. The language of Blackburn, J.'s judgment is not quite consistent with the facts, nor indeed intelligible. If the document in question had not been in the possession of the defendants (treating the possession of their solicitor or agent as their possession) it is quite clear that the Court would not have ordered the defendants to produce it. The objections to production are based not on a joint possession but alleged joint interest, a totally different matter. The case of *Reid* v. *Langlois* (1 Mac. & G. 627) there cited is also in point in the present case.

1882

KEARSLEY v. PHILIPS.

Bigham, and *C. A. Russell*, for the plaintiff, moved by way of appeal from the decision of the judge at chambers. The affidavit on which the objection to produce is based is not sufficient. It merely states that the documents in question are in the joint possession of the defendant Philips and one Blathwayt. It does not shew the nature of such joint possession, or that the party jointly interested refuses or objects to the production, or whether application has been made to him to allow production, or that it is impossible to produce by reason of his refusal. It is quite possible consistently with this affidavit that the defendant Philips may be perfectly able to produce these documents; that his co-trustee may make no difficulty or objection at all with respect to the inspection. In 1 Seton on Decrees, 4th ed. p. 152, it is laid down that the affidavit or answer must shew that the party cannot produce the documents, and that it is not enough to say that, to the best of the deponent's information and belief, the person in whose custody they are will not produce them, and that the nature of the joint possession must be shewn. For this proposition are cited *Taylor* v. *Rundell* (1), and *Mertens* v. *Haigh*. (2) *Walburn* v. *Ingilby* (3), is an authority directly in point to shew that this affidavit is insufficient.

[FIELD, J. The learned judge at chambers seems to have thought that this case was governed by *Murray* v. *Walters*. (4) After the decision in that case *Walburn* v. *Ingilby* (3) can hardly be considered as an authority for the plaintiff's contention. *Edmunds* v. *Lord Foley* (5), seems also an authority against it.]

It is doubtful how far the Chancery decisions are applicable to production under the Judicature Act. The question now depends on the express terms of Order XXXI. In Chancery the remedy was by bill for discovery, and was subject to the general rules affecting all suits, one of which was that all parties interested or against whom relief was to be obtained must be brought before the Court by being made parties to the suit. Therefore inspection would not be granted when a possessor of the document was not made a party. But discovery under the Judicature Act is an-

(1) Cr. & Ph. 104.
(2) 3 De J. & S. 528.
(3) 1 M. & K. 61.
(4) Cr. & Ph. 114.
(5) 30 Beav. 282.

cillary only to the action and Blathwayt could not be made a party to the action. Therefore the technical rule of the Court of Chancery does not apply.

Hutchinson v. *Glover* (1), is an authority in favour of the plaintiff.

[They also cited *Bovill* v. *Cowan* (2); *Hadley* v. *McDougall.* (3)]

Smyly, for the defendants, was not called on to shew cause.

FIELD, J. This is an appeal against the decision of North, J., declining to make an order for inspection of certain documents. The action is one of trespass and is brought against two defendants named Philips and Ducane. The defendants were mortgagees, and justified under an alleged right of distress on the premises, and the person whose goods were seized now seeks to render them liable for such seizure. It appears that since the distress Ducane ceased to be a trustee, and thereupon Blathwayt was appointed a trustee in his place, and the mortgage was transferred from Philips and Ducane to Philips and Blathwayt. It does not seem to me that Blathwayt could in any way be made a party to this action, or that any amendment could be made so as to obtain discovery as against him, and therefore I do not think we can support the conclusion at which we have arrived on the suggestion that the plaintiff could adopt any such mode of obtaining what he seeks. What the affidavit of the defendant Philips says is that he and Blathwayt jointly have in their possession or power the documents mentioned in the second schedule, and these documents are muniments of title of himself and Blathwayt.

The sense in which this allegation must be construed is, it seems to me, that pointed out by Cottenham, L.C., in *Reid* v. *Langlois.* (4) He says, "the plaintiffs have read insulated passages from the answer in which the word 'possession' is used, and the defendant has perhaps incautiously in single and detached passages of his answer admitted that the documents are in his possession; but it is quite clear that on a motion to produce documents, or to pay money into court, detached passages of the answer cannot be read, but the whole case must be taken as it is

(1) 1 Q. B. D. 138.
(2) Law Rep. 5 Ch. 495.
(3) Law Rep. 7 Ch. 312.
(4) 1 Mac. & G. 627.

1882

KEARSLEY v. PHILIPS.

found in the answer. It is clear that what the defendant means by possession is not a legal possession, but an actual corporeal possession, just as a man may have in his own desk, or in his own house, property of which he is only part owner. In one sense it is in his possession, but when possession for the purpose of production is spoken of, that is to say a right and power to deal with it, actual corporeal possession is not meant, but legal possession in respect of which the party is authorised to deal with the property in question, and I have no doubt but that on this answer the defendant does state that his father is in the joint legal possession with himself, and that the books, therefore, are not under his direction or control, not being in his sole possession, that is his sole legal possession, although they may be corporeally in his actual possession." This passage seems to me clearly to shew that, when the defendant says that these documents are jointly in the possession or power of himself and Blathwayt, he must mean that, although they may be in his desk at the present moment, or more probably at the office of his solicitor, so far as they are in his possession, they are only in his possession on behalf of himself and the person jointly entitled. The question is whether under these circumstances the affidavit is sufficient, or whether he must go on to make some such further statement as that he has applied to such other person, and such other person has refused to consent to the production, or that by reason of such refusal it is physically impossible for him to give production of the documents. Of course such further statement would constitute a sufficient answer, and I own that at the beginning of this argument I was inclined to think that some further statement was necessary in order to negative the right to inspection. It would seem that some such statement would be necessary in the case of declining to answer interrogatories, and not distinguishing sufficiently between the cases of production of documents, and answering interrogatories, may perhaps account for my concurring in some of the observations made in *Hutchinson* v. *Glover*. (1) But how does the case stand upon the authorities with regard to production of documents? I cannot accede to the suggestion that we should reject the authority of the Chancery cases, because this is an

(1) 1 Q. B. D. 138.

application under Order XXXI. The practice with regard to discovery and production of documents in courts of common law is of comparatively modern date, and ever since its introduction regard has been had to the equity decisions on the subject, and, even if there was any conflict between the practice in equity and at common law, since the Judicature Act it appears to me that that distinction is done away with and the equity practice in this matter must prevail. It lies on the plaintiff's counsel to make out that they have a right to the production of these documents. They contend that the defendant's affidavit is insufficient, because it does not allege that the defendant has applied to his co-trustee to consent to produce the documents, or that he could not if he wished obtain possession of them for the purpose of production. They cite as authorities for that contention a passage from Seton on Decrees, and the case of *Walburn* v. *Ingilby*. (1) If that case had remained unquestioned, it is possible we might have felt bound to act upon it, but since that case the matter has been much discussed, and there have been various decisions. In the case of *Murray* v. *Walters* (2), the Lord Chancellor said, "It is perfectly true that if documents are in the hands of an agent, the principle of the Court is that the possession of the defendant's agent is the possession of the defendant against whom the order is made. But here the agent is the agent not only for the defendant against whom the order is prayed, but also for other defendants. The defendant, against whom the order is prayed, has not the possession of the documents either personally or through an agent. I have always understood the rule to be that under such circumstances the Court would not make an order for the production. *Walburn* v. *Ingilby* (1), as reported, no doubt seems to infringe on that rule. All I can say is, that I never considered that the practice was altered by that case. There must have been some peculiarity in that case which does not appear in the report." It would certainly seem, therefore, that in 1839, the Lord Chancellor thought that *Walburn* v. *Ingilby* (1) had not altered the practice, and that it was inconsistent with the practice to order production of documents in a case like the

(1) 1 M. & K. 61. (2) Cr. & Ph. 114.

1882

KEARSLEY v. PHILIPS.

present. The case of *Murray* v. *Walters* (1) seems to me to decide this question. As I read the decision it does not depend on any such ground as the want of parties, but on the principle that the Court will not compel a man to disclose another man's deed. It seems to me that the true ground of the decision is that you cannot in an action against a man who has possession of a deed conjointly with another, that is to say whose possession, there being a joint title, is in law the possession of himself and another, compel production by him of the deed which belongs to another man as well as himself. The case of *Reid* v. *Langlois* (2), and that of *Edmonds* v. *Lord Foley* (3), are to the same effect. In the latter case the Master of the Rolls says, "I think that after the decision of Lord Cottenham in *Murray* v. *Walters* (1), I cannot order the production of these deeds in the absence of the other parties interested in them." The case of *Mertens* v. *Haigh* (4), was relied on by the plaintiffs' counsel, but that was an entirely different case. There was no question of joint possession in that case. The defendant was the sole owner of the documents, but they were in the possession of a clerk of his at New Orleans, and the Court said that the answer was insufficient for not shewing that the defendant had tried to procure the information required. No such question arose there as in this case. With regard to *Hutchinson* v. *Glover* (5), I agree with Mr. Justice North's mode of dealing with that case, and I prefer to rely on the decision in *Murray* v. *Walters*. (1) For these reasons I think this appeal must be dismissed.

STEPHEN, J. I am of the same opinion. There seems to have been some amount of conflict among the decisions on this subject. On the one hand the cases of *Reid* v. *Langlois* (2) and *Murray* v. *Walters* (1) seem to be expressly in point. On the other hand, certain authorities have been cited which I do not think it necessary to go through. Those most nearly in point are *Walburn* v. *Ingilby* (6) and *Hutchinson* v. *Glover*. (5) My Brother Field has dealt with the former case, and I agree with what he has said about it.

(1) Cr. & Ph. 114.
(2) 1 Mac. & G. 627.
(3) 30 Beav. 282.
(4) 3 D. J. & S. 528.
(5) 1 Q. B. D. 138.
(6) 1 My. & K. 61.

1882

KEARSLEY v. PHILIPS.

It is sufficient to refer to the observations of the Lord Chancellor in *Murray* v. *Walters* (1) with regard to the effect of that decision. With regard to *Hutchinson* v. *Glover* (2) I cannot see that there is so much disagreement between that case and our conclusion in the present case as has been suggested. It seems to me that there were facts in that case which distinguish it from the present. Here the documents, of which production is sought, are in the joint power and possession of two persons, one of whom is not before the Court and cannot be made a party to the action; they are the title-deeds of a man who is not and cannot be brought before the Court. The application is that one man should be compelled to produce another man's title-deeds because he has joint possession of them, an application which I should be very reluctant to grant unless bound by authority to do so. The nature of the application and the doctrine involved in *Hutchinson* v. *Glover* (2) were very different. There having been a previous litigation between the defendants and other persons, arising out of the same transaction, viz., a collision between two ships, the question was whether the defendants had made a compromise with the owners of the other colliding ship, which might or might not be evidence that the defendants were liable, the object being to shew that they had admitted liability for the collision. The defendants objected to the inspection, not on the ground that the document was in the joint possession of themselves and the owners of the other ship, and that there was a joint interest, but on the ground that the document related to res inter alios acta, and was irrelevant. It is true that counsel in argument introduced the point now under discussion as to which observations were made by Blackburn, J., but the substantial question for decision seems to have been, not whether the defendants were bound to produce other persons' title-deeds which might be in their possession subject to such other persons' claim and power over them, but whether they should produce a compromise between themselves and other suitors which might shew them to be liable. With regard to that point Blackburn, J., seems to have held, in my opinion, with perfect justice, that the fact that the compromise was res inter

(1) Cr. & Ph. 114. (2) 1 Q. B. D. 138.

1882

KEARSLEY v. PHILIPS.

alios acta had nothing to do with the liability to produce it. He says, "Their admission to one person is evidence quoad every one. Then it is objected that it is not clearly shewn that the document would be evidence for the plaintiffs. But the fact whether a document would be evidence or not for the party claiming inspection is not the test of the right to it." It appears to me that though there is some resemblance between the cases at first sight the questions decided are essentially distinguishable with regard to the character of the documents of which production was sought. It seems to me that we ought not to follow *Walburn* v. *Ingilby*. (1) and that *Hutchinson* v. *Glover* (2) does not really apply. For those reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Englefield, for Storer & Lloyd.*

Solicitors for defendants: *Johnson & Weatheralls, for Wigglesworth & Rogerson.*

E. L.

1882

Nov. 27.

LANGRISH *v.* ARCHER.

Gaming—Vagrant Act Amendment Act, 1873 (36 & 37 *Vict. c.* 38), *s.* 3—"*Open and public Place to which the Public have or are permitted to have access*"—*Railway Carriage.*

The Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, imposes a penalty upon "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any coin, card, &c., used as an instrument or means of such wagering or gaming, at any game or pretended game of chance":—

Held, that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the section.

CASE stated by a metropolitan police magistrate under 42 & 43 Vict. c. 49, s. 33.

Upon the hearing of a complaint preferred by the appellant

(1) 1 My. & K. 61. (2) 1 Q. B. D. 138.

against the respondent under s. 4 of 5 Geo. 4, c. 83 and 36 & 37 Vict. c. 38, s. 3 (1), it appeared that the respondent and two other men entered a first class carriage belonging to the South Western Railway Company at the Waterloo terminus. The respondent and the other two men were apparently acquainted, and were afterwards seen at Kempton Park Races together. One of the men produced three cards while the train was on its journey and then and there being used for the conveyance of passengers from the Waterloo Station, Surrey, to Sunbury, Middlesex, and commenced playing a game commonly known as the "three card trick." The respondent put money upon the cards and lost and won, and one Robert Poehl, a German, played at the game above mentioned at the invitation of the man who produced the cards and lost between 7*l.* and 10*l.*

On the part of the appellant it was contended that the respondent should be convicted as a rogue and vagabond, as a railway carriage on its journey, and then and there being used for the conveyance of passengers, was such "other open and public place" or "any open place to which the public had or were permitted to have access" within the intent and meaning of the above mentioned statutes.

On the part of the respondent it was contended that such a railway carriage was not such other open and public place or any open place to which the public had or were permitted to have access, and that he ought to be discharged from custody.

The magistrate discharged the respondent.

The question for the opinion of the Court is whether the railway carriage being on its journey and then and there

(1) By the Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3: "Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance shall be deemed a rogue and vagabond within the true intent and meaning of 5 Geo. 4, c. 83, and as such may be convicted and punished under the provisions of that Act, or in the discretion of the justice or justices trying the case, in lieu of such punishment, by a penalty for the first offence not exceeding 40*s.*, and for any second or any subsequent offence, not exceeding 5*l.*"

1882

LANGRISH v. ARCHER.

used for the conveyance of passengers is or is not "such other open and public place or any open place to which the public have access or are permitted to have access" within the above Acts.

Danckwerts, for the appellant. The magistrate was wrong, for a railway carriage while on its journey is among the places referred to by 36 & 37 Vict. c. 38, s. 3. *Ex parte Freestone* (1) is a strong authority to this effect. There a conviction under 5 Geo. 4, c. 83, s. 4, for playing cards in an open and public place, to wit, in a railway carriage, was quashed, but simply on the ground that it did not appear that the carriage was travelling for the conveyance of passengers, Martin, B., saying, "It must not be understood that gaming in a railway carriage travelling along the line is not within the Act." The words of 36 & 37 Vict. c. 38, s. 3, are larger than those of 5 Geo. 4, c. 83, s. 4, which applies to every person playing or betting in any street, road, highway, or other open and public place, while the later Act adds the words "or in any open place to which the public have or are permitted to have access." The additional words are at any rate large enough to include the case of a railway carriage on its journey.

Woodgate, for the respondent. A railway carriage is not "an open or public place to which the public have or are permitted to have access." To satisfy this definition the place must be open to the public permanently or temporarily, and without any condition as to the payment of money. To hold that any place where persons can obtain admission by paying for the privilege is within the Act would be to extend its operation beyond what can be supposed to have been contemplated.

LORD COLERIDGE, C.J. I think that the magistrate was wrong, and that the respondent ought to have been convicted. The question arises under 36 & 37 Vict. c. 38, s. 3, by which any person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access is liable to be convicted as a rogue and a vagabond, and we have to decide

(1) 25 L. J. (M. C.) 121.

1882

LANGRISH v. ARCHER.

whether a railway carriage while on its journey over the railway is one of the places referred to in the section. Is it an "open and public place" within the first part of the section? I think that it may fairly be contended that the carriage is not an open and public place of the same character as a road or highway, but in the present Act we have the additional words "any open place to which the public have or are permitted to have access." In *Reg.* v. *Holmes* (1) it was held that an omnibus was so far a public place that a person might be indicted for exposing his person in it. This case may assist us in coming to a conclusion, though it is not an authority upon the precise question; and in *Ex parte Freestone* (2), where it was held that a conviction upon 5 Geo. 4, c. 83, s. 4, for playing cards in a railway carriage must be set aside, because it was not shewn affirmatively that the carriage was being used for the conveyance of passengers, there is a strong intimation of opinion that if this evidence had been forthcoming the conviction would have been sustained. It has been argued that the public have not access to the railway carriage, for they are only admitted upon certain terms, that is, upon payment of their fares. But the company cannot exclude any person from the carriage while there is room and he is ready to pay his fare. When this condition is complied with the public have access to the carriage in the same way as they have to a highway, and the section nowhere says that "access" is to mean access without the obligation of paying anything for it.

STEPHEN, J. I am of the same opinion. Although it was not actually decided in *Ex parte Freestone* (2), that a railway carriage while in the act of conveying passengers was "an open and public place" within 5 Geo. 4, c. 83, it may be inferred that if the facts had raised the question, the Court would have decided it in the affirmative. It has been urged that inasmuch as admission in a railway carriage can only be obtained by paying for a ticket the carriage is not an open or public place to which the public have or are permitted to have access. But there is nothing in the section from which we can infer that the word "access" does not include an access which can only be obtained by a money pay-

(1) 22 L. J. (M.C.) 122. (2) 25 L. J. (M.C.) 121.

1882

LANGRISH v. ARCHER.

ment; and I see no reason in the facts of the case before us why it should not be brought within the operation of the statute.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor to the Treasury.*
Solicitor for respondent: *Biale.*

A. P. S.

1882
Nov. 9.

THE MAYOR, ALDERMEN, AND BURGESSES OF SWANSEA *v.* THOMAS.

*Landlord and Tenant—Lease for Years—Assignment of Term—Assignment of Reversion of Part of Demised Premises—Privity of Contract—Covenant to pay Rent, whether divisible—Apportionment—*32 *Hen.* 8, *c.* 34.

The defendant, being tenant of land under a lease for years granted by the plaintiffs and containing the usual lessee's covenant to pay rent, assigned all her interest in the term. Subsequently the plaintiffs granted their reversion in part of the demised premises. No rent having been paid by the assignees of the defendant, the plaintiffs sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in the plaintiffs:—

Held, that the covenant to pay rent was divisible; that the rent could be apportioned, although the action was founded on a privity of contract only; and therefore that the plaintiffs were entitled to recover.

Stevenson v. *Lambard* (2 East. 575), considered.

FURTHER CONSIDERATION before Pollock, B. The facts are stated in the judgment.

June 19, 20. *McIntyre, Q.C.*, and *Brynmôr Jones*, for the plaintiffs.

Christopher James (*W. D. Benson*, with him), for the defendant.

The following authorities were cited, in addition to those mentioned in the judgment: *Chitty* on Pleading, vol. i. 7th ed. 123, 127; *Marrow* v. *Turpin* (1); *Thursby* v. *Plant* (2); *West* v. *Lassels* (3); *Collins* v. *Harding* (4); *Simpson* v. *Clayton* (5);

(1) Cro. Eliz. 715.
(2) 1 Wm. Saund. at p. 240, n.
(3) Cro. Eliz. 851.
(4) Co. Rep. Pt. 13, 57; Cro. Eliz. 606, 622.
(5) 4 Bing. (N.C.) 758.

Thompson v. *Hakewell* (1); Vin. Abr. tit. Rent. p. 507; *Holgate* v. *Kay* (2); 2 Bac. Abr. tit. Covenant D. 346.

Cur. adv. vult.

Nov. 9. POLLOCK, B. This action was brought to recover 16½ years' arrears of rent alleged to be due to the plaintiffs in respect of certain premises let by the plaintiffs to Thomas Thomas, of whom the defendant was the widow and executrix. At the trial before me at the Glamorganshire Summer Assizes, and subsequently upon further consideration, the following facts were agreed upon by counsel.

By an indenture dated the 19th of June, 1835, the plaintiffs let to Thomas Thomas two fields called "The Burrows," and also a field called "Goose Island," for the term of ninety-nine years, at the yearly rent of 10*l.* in respect of the two fields, and of 15*l.* 15*s.* for Goose Island. Thomas Thomas died on the 3rd of January, 1844, having appointed by his will the defendant his sole executrix. On the 31st of October, 1863, the defendant assigned her interest in the premises to certain trustees. Before the 25th of December, 1864, the then residue of the term in Goose Island had become vested by assignments from the defendant in Lewis Thomas, Edward Cory Thomas, and the Rev. J. G. Mould, and by an indenture of that date, to which the plaintiffs were parties, L. and E. C. Thomas and Mould assigned a portion of Goose Island to the trustees of Swansea Harbour, and by the same deed the rent was apportioned between the assignees of the defendant and the harbour trustees as follows: The assignees of the defendant were to pay 15*l.* 2*s.* per annum, and the harbour trustees to pay 13*s.* per annum. On the same date as the last-mentioned assignment the assignees of the defendant assigned to Watson & Overend, contractors, the whole of their remaining interest. Shortly afterwards the plaintiffs granted to the Llanelly Railway and Dock Co. their reversion in part of Goose Island, but no apportionment of the apportioned rent of 15*l.* 2*s.* was then made. No rent was paid by the defendant or her assignees since the assignment to Watson & Overend. No rent had been paid by Watson & Overend, nor was there any evidence to show that the

(1) 35 L. J. (C.P.) 18.

(2) 1 C. & K. at p. 344.

1882

MAYOR OF SWANSEA v. THOMAS.

plaintiffs had accepted them as tenants; on the other hand it was admitted that it did not appear that the defendant had ever been in actual possession of any part of the premises.

Upon this state of facts it was contended on the part of the plaintiffs that the defendant was bound to pay such an amount of rent as would be due upon apportionment in respect of that portion of Goose Island the reversion of which remained in the plaintiffs.

The liability of the defendant, as executrix of the lessee, arises from privity of contract, and not from privity of estate. As executrix of the original lessee she is liable upon the covenant contained in the lease for payment of rent.

On the part of the defendant it was contended, first, that the plaintiffs, upon the facts stated, must be taken to have recognised Watson & Overend as their tenants, and therefore that they could not now maintain an action against the defendant for the rent sued for. If the plaintiffs had received rent from the defendant's assignees this might have been so, because by so doing they would be taken to have accepted the assignees as their tenants, and so privity of contract between the plaintiffs and the defendant would have been extinguished, in accordance with the well-known doctrine laid down in *Walker's Case* (1); but it was admitted by counsel for the defendant that no rent had ever been paid by the assignees, and the defendant's name still stood as tenant in the books of the corporation. Under these circumstances the mere knowledge by the plaintiffs of the assignment did not amount to an extinguishment of the privity of contract between the plaintiffs and the defendant.

It was contended, secondly, that an action would not now lie for the original rent, or any portion of it, inasmuch as the reversion in a part of the premises let by the original lease had been assigned by the plaintiffs. This ground of defence requires more consideration. The defendant is sued as executrix upon the covenant entered into by her testator, and to the extent of her assets she is liable for any breach of that covenant, if it be still in force. A part of the rent which should have been paid under the covenant has not been paid, and, primâ facie, she, as executrix, is

(1) Co. Rep. Part III. 22 A, B.

liable for the breach. Considerable discussion took place in the argument before me about the apportionment of the rent which has been made by parties other than the lessee and the defendant his executrix. As they were strangers to that apportionment, the defendant is in no respect bound by it, as clearly appears from the case of *Bliss* v. *Collins*. (1) It may therefore be excluded from the case as irrelevant. If the defendant is liable for anything, the amount, in the absence of consent upon her part, must have been fixed by a jury, and as I have been placed by agreement of the parties in the position of a jury, it must now be fixed by me; and further, in regard to the amount no question arises, because it was admitted by the defendant's counsel that, if the rent could be apportioned, the amount of 8*l.* 8*s.* per annum was a proper sum, and that which the plaintiffs would be entitled to recover. Why then is not the defendant liable for the breach of her testator's covenant? At common law, before the statute 32 Henry 8, c. 34, it is clear that, notwithstanding the assignment by the plaintiffs of their reversion in part of the premises, and notwithstanding any number of assignments by the lessee or his assignee, the plaintiffs might have sued the lessee or his executrix for the breach in question. The effect of that statute is to give to the assignee of the reversion the same right of suing the lessee and his executrix as the original reversioner had. And it has been held that the statute transfers to the assignee the privity of contract, and further that the covenant is divisible, so that the assignee of the reversion of part may sue upon the covenant in respect of his interest in that part: see *Twynam* v. *Pickard*. (2) If, therefore, the reversioner can assign the reversion of part of the premises to A. and of the residue to B., and A. and B. can both sue in respect of their respective interests, there seems no good reason why, if the reversioner assigns the reversion of part of the premises to A., and reserves to himself the reversion in the residue, he should not be allowed to sue in respect of his interest in the residue. In the case of *Pyott* v. *St. John* (3), the lessor, being seised in fee of the reversion in part, and entitled to a term of years in the residue, demised the whole by one deed,

(1) 5 B. & Ald. 876.

(2) 2 B. & Ald. 105.

(3) Cro. Jac. I., 329.

1882

MAYOR OF SWANSEA v. THOMAS.

and then assigned his reversion in the fee simple portion by one deed, and the reversion in the term of years portion by another deed, both to the same person, and it was contended, not that the assignee could not sue in respect of each part, but that as there were two assignments there should have been two writs of covenant, or at least two counts. It was held, however, that the action was rightly brought. That case, and the case of *Twynam* v. *Pickard* (1), were both actions on the covenant to repair, but if the statute divides a covenant to repair between two holders of the reversion, I see no good ground for holding that it does not divide a covenant to pay rent.

There seems to have been some confusion in the older cases with regard to the right of a reversioner to sue for an apportioned rent, where that rent was due by reason of privity of contract, and not by reason of privity of estate, and what is said in some of these cases can hardly be reconciled. This probably arises, however, from the fact that in most of them the question arose upon the consideration whether the action was brought in a proper form, and whether it should be in debt or covenant. A further consideration of these cases, now that forms of action have been abolished, would seem to be unprofitable, especially as in the present case, the plaintiffs not having accepted the assignees as tenants, the action might, when forms of action existed, have been framed in debt, as appears from 1 Wms. Saund. 241 a, note 5. One case, however, which contains an expression of opinion by Lord Ellenborough in delivering the judgment of the Court, ought to be noticed; I refer to the case of *Stevenson* v. *Lambard*. (2)

The action was by landlord against assignee of lessee, who had entered and was in possession of the premises. The defendant pleaded an eviction, as to one undivided moiety of the premises, by one claiming under a title superior to the plaintiff. The Court held that, notwithstanding this, the plaintiff was entitled to recover for an apportionable part of the rent, but this holding was upon the ground that the liability of the defendant arose from privity of estate, and not from mere privity of contract. And Lord Ellenborough said, "The question is, whether the rent be apportionable in this action of covenant by the lessor against the

(1) 2 B. & Ald. 105. (2) 2 East. 575.

assignee of the lessee. It clearly is so in an action of debt, or upon an avowry in replevin, by all the authorities; and the only question is, whether it be so in covenant. In covenant as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory, as any other personal contract is, the rent is not apportionable," and for this he cites Bro. Contract. pl. 16, Moor. 116; Finch's Law, lib. 2, c. 18.

This, and other authorities to which I have referred, appear to me to be open to the observation which I have already made, and it is observable that what Lord Ellenborough said in *Stevenson* v. *Lambard* (1) was only a dictum unnecessary for the decision of the case before him. Nor does it appear by the report that the bearing of the statute of Henry VIII., or the case of *Pyot* v. *St. John* (2) was called to the attention of the judges, or considered by them; and the remarks which occur in the judgments appear to have been made upon the supposition that the question depended solely on the common law. Since that decision the cases of *Bliss* v. *Collins* (3) and *Twynam* v. *Pickard* (4) have been decided, and I cannot think I am bound by the dictum in *Stevenson* v. *Lambard.* (1)

The result, therefore, will be that my judgment is for the plaintiffs against the defendant for sixteen-and-a-half years of the apportioned rent at the rate 8*l.* 8*s.* per annum as agreed by counsel, amounting to 138*l.* 12*s.*, to be paid by the defendant out of the assets of the testator. Before, however, judgment is entered, the plaintiffs' statement of claim may be amended to meet the facts of the case as now admitted. With regard to costs of the action, I cannot but say that the claim is one which bears hardly upon the defendant. It is said that the corporation of Swansea ought to get their sixteen-and-a-half years' rent if it be due in law, but to this it may well be answered that, had not the agents of the corporation being guilty of great neglect, they might have obtained it long ago from those who enjoyed the actual occupation of the land in question, and that the defendant is now fixed with the liability for a rent, the amount of which up

(1) 2 East. 575.
(2) Cro. Jac. I. 329.
(3) 5 B. & Ald. 876.
(4) 2 B. & Ald. 105.

1882

MAYOR OF SWANSEA v. THOMAS.

to the present time has never been ascertained, and which, in accordance with the usual order of events, she might well suppose she was not liable for since the date of the assignment in 1863. Under these circumstances I think it but just to say that each party must pay their own costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Sharp, Parkers, Pritchard & Sharp, for John Thomas, Swansea.*

Solicitor for defendant: *H. A. Stephens, for Francis James, Swansea.*

W. A.

1882
Dec. 7.

[IN THE COURT OF APPEAL.]

In re CHAPMAN.

Practice—Costs—Counsel at Chambers—Solicitor and Client—Taxation—Special Allowances—Rule 14.

The Supreme Court Rules, Special Allowances, r. 14, that "as to counsel attending at judge's chambers no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend" applies to taxation of costs between solicitor and client as well as between party and party:—

So *held*, affirming the decision of the Queen's Bench Division. (1)

APPEAL from the decision of the Queen's Bench Division (1) refusing to review the taxation of the appellant's bill of costs.

The appellant was a solicitor, and on the taxation of the bill of costs delivered by him to his client the master disallowed the fee and costs in respect of the attendance of counsel at judge's chambers for which the judge had not certified, he not having been asked to do so. The client had expressly authorised the appellant to engage the attendance of counsel, but the master considered that rule 14 (2) of Special Allowances applied to taxation as between solicitor and client as well as between party

(1) 9 Q. B. D. 254.

(2) Rule 14 of Special Allowances (part of additional Rules of Court under the Judicature Act, 1875) is: "As to counsel attending at judge's chambers, no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend."

and party, and he therefore disallowed such fee and costs, as the judge had not certified for counsel.

A summons to review this taxation was dismissed by Mathew, J., at chambers, and the Queen's Bench Division on appeal affirmed the decision of that learned judge and refused an order to review.

The appellant appealed.

R. B. Muir, for the appellant. Rule 14 does not apply to costs as between solicitor and client. In the old rule of Hilary Term, 1853, rule 6, it was expressly stated that the costs of the attendance of counsel at chambers should in no case be allowed "as between party and party" unless the judge certify, and because these words "as between party and party" are omitted in rule 14, it was considered both by the master and by the Queen's Bench Division that it was intended that such last rule should apply to costs as between solicitor and client; but, as stated in Wilson's Rules (2nd ed. p. 466), this rule 14 is taken from Chancery Court Order XL. rule 29, and therefore the intention was only to follow the Chancery system. That Order XL. rule 29 was never in Chancery applied to costs other than those as between party and party, except where the costs had to be paid out of some particular fund.

[LORD COLERIDGE, C.J. There are several rules of Special Allowances which are not limited to costs as between party and party, for instance, rule 29 says that the discretion of the taxing officer is to be guided by "the interest of the parties, the fund, or person to bear the cost." The rules are made under s. 17 of the Judicature Act, 1875, which by sub-s. 3 authorises rules to be made "generally for regulating any matters relating to the practice and procedure of the said courts respectively, or to the duties of the officers thereof, or of the Supreme Court or to the costs of proceedings therein." Does not that apply to the costs of ex parte proceedings? yet if your contention be right you must go the length of saying that "proceedings" mean those other than ex parte proceedings.]

It is surely not necessary for the appellant's case to go to that extent. The taxation here was under the Solicitors Act, 6 & 7

1882

IN RE CHAPMAN.

Vict. c. 73, and not under the Judicature Act, and before that last Act the old rule of Hilary Term, 1853, only applied to costs as between party and party, and one ought to go back to such old practice in respect of the taxation complained of, for the Special Allowance rules under the Judicature Act, 1875, do not affect to deal with costs as between solicitor and client. The master ought, in the exercise of his discretion, to inquire whether it was proper for the solicitor to have employed counsel, but here he exercised no discretion in the matter whatever. It is stated in Archbold's Practice (13th ed. p. 1280), after alluding to rule 14, that "the successful party should therefore ask the judge to certify," inferring, therefore, that the rule applied only to costs as between party and party, and that consequently it was not necessary for the unsuccessful party to apply.

F. McLeod appeared for the respondent, but was not called upon.

LORD COLERIDGE, C.J. I do not complain of this case being brought before this Court, because though the sum involved in it is small it raises a point of some importance. Still it is one which appears to me to be quite clear. I place my decision on the plain words of rule 14, and I am not disposed to fritter away their meaning, for I prefer saying that words mean what they say. Here one has to deal with a rule which says that no costs of counsel attending at judge's chambers "shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend." That rule was framed under an Act of Parliament which authorizes the judges there mentioned to make rules for, inter alia, regulating any matter relating to the practice and procedure of the High Court and Court of Appeal respectively, "or to the duties of the officers thereof, or of the Supreme Court, or to the costs of the proceedings therein." This is all recited at the head of the rules of which this rule 14 is one, and all of which are professed to be so made under the Act. Now it is plain to my mind that unless "costs of proceedings therein" mean costs other than those of ex parte proceedings, the rules were made under an authority which would empower them to be made for regulating the costs between solicitor and client. I

cannot think that it was ever intended to exclude from the rules such a large class of proceedings as proceedings which are carried on ex parte, yet, if the contention on behalf of the appellant be correct, all such proceedings are excluded from the meaning of these words "costs of proceedings therein;" words which are large enough to include them. Is there anything in any of the rules to exclude such proceedings? I think there is not. If no portion of the rules could fairly be applied to ex parte proceedings it would no doubt go a great way to support the appellant's contention, but on looking at the rules it will be seen that it is not the case, and that several of them can be so applied. Then rule 28 which states that the rules and practice relating to costs prior to the Judicature Act, 1875, are to remain in force so long as they are not inconsistent with that Act and the rules in pursuance thereof, by necessary implication destroys those which are inconsistent with such Act and rules. Independently of that, however, there appears to me to be other rules besides the 14th, which do not exclude the case of costs as between solicitor and client, and if that be so, there is no reason why one should limit the meaning of the plain words of rule 14, which states expressly that no such costs of counsel "shall in any case be allowed, unless the judge certifies," to the costs between party and party, especially as on the true construction of the rules and of the Act of Parliament under which they were made, I think it was intended that rule 14 should apply to the case of costs between solicitor and client. I am very anxious however not to do injustice to this particular appellant who, being under the impression that this 14th rule did not apply to such a case as the present, did not ask the learned judge at chambers to certify and call his attention to the fact that counsel was instructed at the express request of the client. Under these circumstances, therefore, whilst this appeal ought to be dismissed with costs, it is only just, I think, that it should be without prejudice to the appellant's making an application to the judge at chambers to certify that it was a proper case for counsel if he should think fit to do so. For myself I must own the mere fact that the client directed counsel to be employed would by no means be conclu-

1882

IN RE CHAPMAN.

sive, and would go a very little way in influencing my decision, because I regard this 14th rule as having been made for the express protection of the client, who in nine cases out of ten is entirely in the hands of his solicitor. Still, for the reason I have given, I think there should be reserved an opportunity to the appellant to apply to the judge for his certificate.

BAGGALLAY, L.J., concurred.

LINDLEY, L.J. I also concur in this appeal being dismissed. Mr. Muir has argued that these rules are confined to the taxation of costs between party and party, but I think that that is not so, and that some of the rules apply to all cases of taxation whether between party and party or solicitor and client. I doubt whether all the consequences of rule 14 were foreseen when it was made, but I think it impossible to get out of the plain language of that rule, and therefore I concur in the construction which has been put upon it.

Appeal dismissed.

Solicitor for appellant: *Chapman.*
Solicitors for respondent: *Kisch, Son, & Hanbury.*

W. P.

MUNDAY *v.* THE THAMES IRONWORKS AND SHIPBUILDING COMPANY, LIMITED.

1882
Nov. 14.

Master and Servant—Employers' Liability Act (43 & 44 *Vict. c.* 42), *s.* 6—*Action in County Court—Removal of.*

By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 6, "Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a county court may by law be removed."

A plaintiff having brought in the county court an action against his employers, to recover compensation under the Act for an injury through the breaking of a chain, applied for a certiorari to remove the action into the superior Court on the grounds that his notice given under the Act was defective; that he desired to consolidate the action with one brought by him in the superior Court to recover damages for the same injury from the defendants on their common law liability, and that the questions arising were of considerable complexity and legal difficulty:—

Held, that the power of removal ought only to be exercised in exceptional cases, and that no such special grounds had been shewn as to induce the Court in its discretion to grant the application.

APPEAL FROM CHAMBERS.

An action under the Employers' Liability Act (43 & 44 Vict. c. 42), having been commenced in a county court, the plaintiff obtained an order to shew cause why a certiorari should not issue to bring up the action for trial in the High Court. In an affidavit of the plaintiff's solicitor he stated that the plaintiff, while employed as a labourer by the defendants, was seriously hurt by a crank falling on his foot, owing to the breaking of a defectively forged or manufactured chain which the defendants had negligently used in their works in its defective state, or had negligently omitted to test and repair; that the plaintiff had given a notice under the Act which, as his solicitor was advised and believed, was defective; that he, the solicitor, was advised and believed that the defendants were liable to the plaintiff both at common law and under the Act, and that the plaintiff desired to pursue both remedies, and to remove the county court action that it might be consolidated with an action contemporaneously commenced in the High Court to recover damages for the same injury from the defendants on the ground of their common law

1882

MUNDAY v. THAMES IRON-WORKS CO.

liability; and that the solicitor was advised and believed that the questions of the character of the negligence, the applicability of the Act, the sufficiency of the notice, and the other questions on which the liability of the defendants depended, were of considerable complexity and legal difficulty. The order nisi was discharged by Denman, J., at chambers.

J. Lawson Walton, for the plaintiff. The plaintiff has a double remedy; one at common law, if the negligence was that of the employers themselves; the other under the Employers' Liability Act. In respect of the common law liability he claims more damages than 50*l.*, which sum is the limit of the jurisdiction of the county court, and he cannot try his case under the Act in the High Court unless the certiorari is issued to remove the action which was rightly brought in the county court, "but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a county court may by law be removed;" 43 & 44 Vict. c. 42, s. 6. When removed, the two actions may be consolidated: Judicature Act, Order LI., rule 4. The plaintiff suggests the actual knowledge of defective materials and personal negligence of the defendants, for which he would be entitled to full damages at common law: *Murphy* v. *Phillips* (1); this common law liability is not affected by the Act, whereas the damages recoverable under the Employers' Liability Act are limited by s. 3 to the amount of three years' earnings. But if the facts should not establish the common law liability, the plaintiff would rely on the Act. On the other hand, the statutory remedy may fail because of insufficiency in the notice required by the Act. Removal of some actions is certainly contemplated by the Act as the express provision in s. 6 shews, and s. 5 providing for the deduction from the damages of penalties but not of damages recoverable on the common law liability indicates that proceedings for personal negligence of the employer may co-exist with the statutory proceedings. The action involves difficult scientific and technical questions as to the strength, manufacture, and testing of the chain, and the possibility of discovering defects

(1) 24 W. R. 647.

in it. Difficult questions of law may also arise on the construction of the complicated first section of the new Act, and as to whether the injury was from circumstances within it. The affidavit is enough to justify the removal. Even on the question of the sufficiency of the notice there will probably be an appeal from the decision of the county court judge, and so the case may ultimately come up to the High Court on a mere legal technicality. The plaintiff should be allowed to bring both causes of action into the tribunal where they can both be heard and best decided.

Gaskell, for the defendants, was not called upon to argue.

MANISTY, J. The Employers' Liability Act (43 & 44 Vict. c. 42) was intended to increase, and has no doubt increased, the liability of employers as between themselves and their servants, but the legislature also intended that "Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a county court may by law be removed:" s. 6. A less costly and, as some may think, a more speedy remedy than an action in the High Court is provided. The action *shall* be brought in the county court, but may in our discretion be removed. The first question is whether, on the facts brought before us, we ought to adhere to the rule, or to treat the case as an exception and grant a certiorari to remove it. I myself should be slow to remove an action unless under such special circumstances as are not very likely to arise in cases of this kind, but which may arise exceptionally. I think that in the majority of cases such an affidavit as that brought before us could be made. It could in almost every case be said that difficult questions may arise on s. 1. There must be scientific evidence and witnesses. But this must have been contemplated by the legislature; yet in saying the action shall as a rule be brought in the county court, the legislature has shewn that it deems the county court a competent tribunal to try such questions. We should, in my opinion, be frustrating a primary object of the legislature if we allowed such an action to be removed,

1882

MUNDAY v. THAMES IRON-WORKS CO.

for if we allowed this one to be removed we must allow all similar ones to be removed also. It is sufficient to say that we refuse the application, and that the circumstances are not such as to make me think it right in the exercise of our discretion to remove the case. If we do take into consideration the object of the plaintiff in applying to us, viz., to get the actions in the county court and High Court consolidated, that is to my mind a strong reason against the application, for I doubt whether two such actions can be consolidated; if the legislature had contemplated that a workman should have a double remedy we should, I think, have found some provision to that effect in the Act. It is said that s. 5 points in that direction; but I think it points the other way, for it says that if the workman has recovered a penalty for the same cause he must deduct it from the damages in the action, and if he has not done so he shall not afterwards apply for the penalty, shewing that it was not intended that there should be two heads of compensation for the same cause of action. On the contrary, the ordinary principle is that if there is a statutory proceeding for a particular cause of action and compensation is recovered, although limited in amount, an action at common law for large damages shall not be maintained. If proceedings have been taken before a magistrate and a penalty or damages recovered, an action for the same cause cannot afterwards be brought. But I decide the case simply on the grounds first stated, and do not see any difficulty in the county court judge dealing with the question of notice and all the matters to which I have referred.

DENMAN, J. The only argument of the learned counsel for the plaintiff which has made any impression on my mind is, that if the two actions brought proceed, then, inasmuch as the facts in each will be nearly the same, it would be convenient that the cases should be tried in the same tribunal and that as the one in the High Court cannot be removed to the county court, whereas the one in the inferior Court can be brought up here, the superior Court is the most convenient tribunal for the trial of both actions. But we are opposed to that contention; there are sufficient grounds upon which we, in the exercise of our discre-

tion, refuse the certiorari, for there is nothing to shew whether the writ is a mere speculative writ or well founded; if the writ alone entitled a plaintiff to a certiorari, he could in every action have the tribunal of his choice, or the one in which he might expect to get the largest damages, thinking that a common jury in Middlesex and London would be more likely than a county court judge to take a view, and perhaps an improper view, in his favour. The judgment of my Brother Manisty has removed any shadow of doubt from my mind, and the appeal must be dismissed with costs.

Order affirmed.

Solicitors for plaintiff: *Rodgers & Clarkson.*
Solicitors for defendant: *J. A. & H. E. Farnfield.*

J. R.

VINTER, APPELLANT; HIND, RESPONDENT.

Nov. 24.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Meat unfit for Food of Man—Exposure for sale—Purchase by Customer—Seizure—Condemnation—Liability of Seller to Penalty.*

The respondent, a butcher, exposed for sale part of a cow which had died of disease, and sold the meat to a customer, who took it home for food, and some days afterwards at the request of the appellant, an inspector of nuisances, handed it over to him, and it was condemned by a justice as unfit for the food of man:—

Held, that the meat was not "so seized" and condemned as is prescribed by ss. 116, 117, of the Public Health Act, 1875, and therefore the respondent was not liable, as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under s. 117.

CASE stated under 20 & 21 Vict. c. 43.

An information was preferred against the respondent, a butcher, under ss. 116 and 117 of 38 & 39 Vict. c. 55 (1), charging that

(1) 38 & 39 Vict. c. 55, s. 116: Any medical officer of health, or inspector of nuisances may .... inspect and examine any ... meat ... exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man; ... and if any such ... meat ... appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same, ... in order to have the same dealt with by a justice.

117: If it appears to the justice that any ... meat ... so seized is diseased

1882

VINTER v. HIND.

he the respondent unlawfully did expose for sale certain meat his property, which was afterwards seized by the appellant, then being inspector of nuisances for the rural sanitary authority, the said meat then being in the possession of John Claypole, and intended for the food of man, and then appearing to the appellant as such inspector of nuisances to be unfit for the food of man, and was afterwards duly adjudged by a justice of the peace to be unfit for the food of man and condemned by him accordingly, and by him ordered to be destroyed, to prevent it being used for the food of man. The justices dismissed the information.

It appeared that a cow, the property of Barber, had milk fever, and was slaughtered, and on the next day, the 13th of March, Barber sold the carcase to the respondent for 4*l.*

The respondent exposed the meat for sale in his shop and sold several portions for the food of man.

On the 15th of March, Claypole saw four or five stones weight of the meat exposed for sale in the shop, and purchased it at 5*d.* per lb., and took it away with him for the consumption of his own family and household.

On the 18th of March, the appellant inquired of the respondent if he had on his premises any part of the carcase, and he said, "No, I have sold it all," and none was found on his premises.

The appellant then proceeded to the house of Claypole, and was shewn the meat which he had bought of the respondent, which smelt very offensively, and was then in the opinion of the appellant, unfit for the food of man. On the request of the appellant, Claypole permitted him to take possession of this meat.

The medical officer of the sanitary authority certified that this meat was unwholesome and unfit for the food of man.

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or unsound or unwholesome or unfit for the food of man he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding 20*l* for every ... piece of meat ... so condemned ...

The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.

1882

VINTER v. HIND.

The appellant then took it to a justice who condemned the same and ordered it to be destroyed.

At the hearing, the justices were of opinion, First, that under ss. 116 and 117 of the Public Health Act, the power of the inspector of nuisances arises in regard to the articles of food therein mentioned, only when exposed for sale or deposited in any place for the purpose of sale or of preparation for sale. Secondly, that the meat in question having been already sold by the respondent and removed by the purchaser to his own premises for his private use and consumption, was not exposed for sale or deposited in any place for the purpose of sale or of preparation for sale. Thirdly, that this meat was not in fact seized by the inspector at all, and certainly not so within the terms and meaning of and as required by the said sections, having been voluntarily handed over by Claypole the purchaser, in the manner aforesaid, and Claypole having no intention to sell any of it. And, fourthly, that the words "did belong" in the concluding part of s. 117, and relied on for the appellant, are used in reference only to the fact that meat or other articles duly and lawfully seized when exposed for sale or deposited for the purpose of sale, or of preparation for sale, might, and frequently would have been destroyed before the hearing of an information for the penalty, in which case the words "did belong," would be grammatically correct, and that such is the true reading as well as the intention and meaning of this part of the section referred to, and the justices therefore gave their determination against the appellant. The question for the opinion of the Court was, whether the justices' construction of the words and operation of ss. 116 and 117 of the Public Health Act, 1875, was correct or the reverse.

Sills, for the appellant. The justices were bound to convict the respondent. Sect. 116 of 38 & 39 Vict. c. 55, refers solely to the seizure of unsound food. It is a stringent clause and the powers of seizure are not to be exercised by seizing meat in the hands of a butcher's customer who may eat unwholesome food if he likes. But s. 117 goes further and empowers a justice to condemn it, so as to prevent it being used for the food of man.

1882

VINTER v. HIND.

In *White* v. *Redfern* (1), where the only question was as to hearing the owner of the meat before its condemnation: Manisty, J., says, "Looking to the provisions of s. 117, it will be seen that, in that portion of it which gives the magistrate power to order the destruction of the meat, it contains no such reference to the meat having been exposed for sale, or deposited for the purpose of sale, and intended for the food of man, as is contained in s. 116." The latter half of s. 117 although connected by the word "and" is intended to be a distinct separate enactment imposing a penalty on the person to whom the meat "did belong at the time of the exposure for sale."

[He was stopped.]

Poulter, for the respondent. In *White* v. *Redfern* (1) the meat was seized at the appellant's slaughterhouse. Here it was seized in the hands of the customer. There has been no seizure within the provisions of the Act, and therefore no penalty has been incurred. The words in the penalty clause are all governed by the words "so seized," which refer to the former section and mean seized when exposed for sale. The meat must also be "so condemned" as is prescribed in the first part of s. 117. "The same" means the meat seized when exposed for sale and condemned according to the Act. The condemnation here was not lawful, and a valid seizure and condemnation are conditions precedent to the imposition of the penalty.

Sills, in reply. There may be a good condemnation though the seizure was irregular. But a de facto seizure of bad meat which has been exposed for sale will suffice. Here there is valid condemnation. The words "the same," and "so" are used merely to indicate bad meat condemned.

FIELD, J. The decision of the justices must be affirmed. No doubt this s. 117 has been, as we found when *White* v. *Redfern* (1) was argued, inartificially drawn, and if our decision is contrary to the general intention of the legislature this result is from the collocation of words and the language used in the Act. Before we construe it so as to convict a man in a penalty we must see if the legislature has said that in such events as those

(1) 5 Q. B. D. 15.

which have happened in this case he is to be liable. Those events are peculiar and uncommon. They are shortly as follows: the respondent had on the 13th of March bought a cow which had died from a disease likely to render it unfit for the food of man, and he exposed the meat for sale in his shop and sold several portions for the food of man. If the inspector had come in at that time and seized this meat while in the possession of the respondent and exposed for sale, the subsequent proceedings would have been exactly in accordance with the Act. [The learned judge read s. 116.] We do not know that on the 13th of March the meat was unfit for the food of man at all. It may have been, and probably was so. But a considerable time, nearly five days, elapsed between the exposure for sale and the examination of the meat by the inspector, for it appears that Claypole, the purchaser, took it away on the 15th for the use and consumption of his own family, and it was not until the 18th of March that the inspector, the appellant, after having been first to the respondent and heard what had happened, went to Claypole and was shewn the meat "which smelt very offensively and was then, in the opinion of the appellant, unfit for the food of man." But he had no power to seize it, for it was not then "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale," although it was "intended for the food of man," whereas to come within the terms of s. 116 it must be both exposed for sale, &c., and intended for the food of man. It may be exposed, &c., for sale, and yet be intended only for manure. The gist of the enactment is the exposure for sale of meat unfit for the food of man. This meat was unfit for the food of man, and was on the 18th of March certified so to be. The meat having come into the possession of the inspector by the permission of Claypole there was no seizure. A justice condemned the meat without hearing any person interested in its preservation, for he had no power to do that. I am not sure that he had no jurisdiction to condemn the meat, for there was no proof before him as to whether the seizure was proper or not, and as we decided in *White* v. *Redfern* (1), the condemnation is a mere executive act, and as soon as the inspector brought

(1) 5 Q. B. D. 15.

1882

VINTER v. HIND.

Field, J.

to him the meat accompanied by a certificate of the medical officer that it was unfit for food the justice condemned it. Then the inspector sought to convict the seller as the person to whom it belonged at the time of the exposure for sale.

Mr. Sills argued that the penalty clause is distinct from the preceding enactment, and if the connection were only by the word "and" I should have thought that the meaning of the legislature in using the word was, "we have enacted the foregoing provision, and now go on to enact more." But the next words opposed to the argument for the appellant are "the same." They must refer to something antecedent. Looking back, we find the justice shall condemn "the same" and that "the same" is, amongst other things, any meat "so seized." It might have been argued even then that the construction was in favour of the appellant; but the penalty clause prescribes a penalty for every piece of meat "so condemned." Can we say that, under the circumstances, when there has been no seizure at all, the mere fact of the meat having been condemned on any ground by a justice creates an offence? If that were so, then, inasmuch as *White* v. *Redfern* (1) decides that the meat may be condemned by a justice without any summons or notice to the person to whom it belonged, if this meat had never been exposed for sale by any one but had been taken to a justice and he had condemned it a penalty might have been incurred. It seems to me a necessary condition of the offence that the condemned meat must have been exposed for sale. I wish I could come to another determination, but must conclude that unless there has been a seizure, and condemnation consequent on such seizure, the penalty cannot be imposed.

STEPHEN, J. I am of the same opinion, and also regret that I must come to it. But I cannot do otherwise. It would be unreasonable to suppose that every section in this long Act of 343 sections and many schedules could, at the time when it passed, be criticised with all the care which conveyancers might use in a complicated deed. I do not join in the censure on the mode in which Acts of Parliament are drawn. Considering their

(1) 5 Q. B. D. 15.

number and length the defects in them seem to me few. But there are occasions on which any one may doubt whether the attention of the legislature was directed to the words of a particular clause and to the question whether they were likely to carry out the intention of the legislature. It is mere supposition, but I should suppose these sections were intended to impose penalties up to the sum of 20*l.* on any person who exposed unsound meat for sale. But when the two sections are scrutinised closely it is clear that, whatever may have been meant, that which is suggested by the counsel for the appellant as the meaning has not been expressed. The two sections form a whole. There are words connecting them together, and reading only the words material to the question before us, they are "any officer of health may inspect any meat exposed for sale, and if any such meat appears to be diseased he may carry away the same to have the same dealt with by a justice," and by s. 117, "if it appears to the justice that any meat so seized is unfit for the food of man, he shall condemn the same, and the person to whom the same belongs or did belong at the time of the exposure for sale shall be liable to a penalty." Such is the provision shortly read. Those words taken together describe one process. First, there is to be a seizure of meat exposed for sale, then condemnation by a justice of the meat so seized, and then the person in whose possession it was seized, or whose property it is, will be liable to a penalty of 20*l.* for every piece of meat so seized. It is evident that these three matters form one consecutive process, and if the conditions are not fulfilled the third consequence does not follow. One good test for the interpretation of an enactment of this kind is to think of what words would have been used to convey the meaning which, for the purposes of argument, is sought to be extracted from those actually used. If it had been intended to make mere exposure of meat for sale an offence subjecting the offender to a penalty, the means by which this would have been done would surely have been to throw s. 116 and the first part of s. 117 together, and to make a new section of the latter part so as to run, "Any person who exposes for sale any meat unfit for human food shall be liable to a penalty of 20*l.*" That is what we are asked to find as the

1882

VINTER v. HIND.

Stephen, J.

meaning of the latter part of the section, and I should have been glad to do so. But to arrive at such a result it would have been necessary to take extraordinary liberties with the Act and to leave out all the words of reference and much alter the legislation. I therefore think the true interpretation of the Act to be that which I have stated. This meat was undoubtedly exposed for sale, and diseased and unsound. It was however sold to a purchaser who, I suppose, considered it worth 5*d.* per lb., and took it home to eat. Fortunately for him and his family, the inspector came in and asked for the meat, whether the purchaser was sick of his bargain or not it is unnecessary to inquire, but he gave up the meat, and a justice, rightly or wrongly, ordered it to be destroyed. It is obvious that that did not amount to such seizure and condemnation as are contemplated by s. 116 and the early part of s. 117. A further observation is, that suppose there had been a regular seizure under s. 116 and a regular condemnation by a justice under s. 117, and that then the person to whom the meat belonged had been summoned before the justices, could he have been heard to say on that summons that the meat was not in fact unsound? It appears to us that he could not, for the discretion of the justice on that is to be taken to be conclusive, and if the person summoned could only dispute the seizure or exposure for sale and could not dispute the unsoundness, that is a strong ground to support our construction of the Act.

Judgment for the respondent without costs.

Solicitors for appellant: *Keen & Rogers.*
Solicitors for respondent: *Lee, Ockerby, & Everington.*

J. R.

GOODHAND *v.* AYSCOUGH.

1882
Nov. 25.

Practice—Costs—Higher Scale—Injunction—"Injury to Property"—Trespass.

In Order VI. rule 2, of the Rules of the Supreme Court (Costs)—which allows costs on the higher scale in actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, &c.—the "injury to property" must be a substantial physical injury, and does not include a trespass upon land without injury to the soil, though of a permanent character and committed in the assertion of title.

Chapman v. *Midland Ry. Co.* (5 Q. B. D. 167, 431) discussed.

MOTION to rescind an order of North, J., in chambers, refusing to review the master's taxation of the plaintiff's costs.

The action was for trespasses upon and depasturing with cattle a field in the occupation of the plaintiff as tenant from year to year, the plaintiff claiming 20*l.* damages and an injunction to restrain the continuance of the trespasses. The defendant by his defence justified the trespasses as being owner of the land, and denied that there was any tenancy. At the trial before Fry, J., at the Lincolnshire Summer Assizes, 1882, the jury found a verdict for the plaintiff for the amount claimed, and the learned judge granted an injunction to restrain the defendant from trespassing upon the premises until the lawful determination of the plaintiff's tenancy.

The master upon taxation disallowed the plaintiff costs upon the higher scale upon the grounds, first, that a tenancy from year to year was not "property" within Order VI. rule 2, of the Rules of the Supreme Court (Costs) (1), and secondly, that the procuring the injunction was not the principal relief sought to be obtained.

Upon appeal, North, J., refused to review the taxation. The

(1) Order VI. rule 2 (Costs): Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "higher scale" in the schedule hereto in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringements of rights, easements, patents, and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained.

1882

GOODHAND v. AYSCOUGH.

motion to review the order of North, J., came on for argument before Field, J., and Stephen, J., who directed that the point should be referred for the opinion of Fry, J., before whom the case had been tried.

A. P. Stone, for the plaintiff. The injunction was the principal relief sought to be obtained, for damages could only be given for trespasses up to the date of the writ, and an injunction was essential to secure the plaintiff in the possession of his property.

[FRY, J. Was the trespass an "injury to property" within the meaning of the rule?]

The trespass was really an eviction, and was in the assertion of title. In *Chapman* v. *Midland Ry. Co.* (1), Lush, J., after referring to the words of the rule, says, "all the particular instances of special injunctions mentioned are cases where title is involved or the injury would be of an irreparable character, and the amount of damages could not be estimated." The word "injury" must be taken in the larger and legal sense. It may be conceded that there was no physical injury to the soil, but to deprive the plaintiff of the enjoyment of his property is a substantial injury. Lastly, the words "breaches of covenant" may include a breach of the defendant's implied covenant for quiet enjoyment in the case of a tenancy from year to year.

J. H. Etherington Smith, for the defendant. *Chapman* v. *Midland Ry. Co.* as reported in the Court of Appeal (2), is an authority against the defendant. There Brett, L.J., says, though it was unnecessary to decide the question, that he is inclined to think that the words "injury to property" do not include a mere trespass, but there must be some actual injury to the land. No such injury is shewn, and even if there were any doubt the Court will not interfere with the discretion of the master.

[He was stopped.]

FRY, J. The question which has been referred for my advice turns upon the construction of rule 2 of Order VI. of the Additional Rules of Court of August, 1875. [The learned judge read the rule.] As pointed out in *Chapman* v. *Midland Ry. Co.* (2),

(1) 5 Q. B. D. 167. (2) 5 Q. B. D. 431.

it is plain that, in order to bring a case within the higher scale of costs, it must satisfy both the conditions mentioned in the rule; the action must be brought for one of the objects mentioned in the rule, and the procuring of a special injunction must be the principal relief sought to be obtained. I will not refer to the second condition, except to say that, according to my present impression, the obtaining of a special injunction was the principal relief sought by this action. The question is whether the first condition is satisfied. The words relied upon as shewing that it is are "injuries to property" and "breaches of covenant." I think that the latter words apply only to the case of an express covenant upon which what was formerly known as an action of covenant could have been brought, and that they do not apply to an action on an implied covenant. The real question is whether the action was brought to restrain an "injury to property?" Now, actions to restrain substantial injuries to property were very familiar formerly in the Court of Chancery, and are well known now in both Divisions of the High Court. I mean such injuries as, without any title, digging turf, cutting down trees, or doing an injury to houses. In all these cases there is what I may call a physical injury to property, and I think it is to that class of cases where there is a substantial physical injury that the word "injury" applies. Here what is complained of is a trespass, without any injury to the property, except such as was merely incidental to the trespass. The only injury was the eating of grass by the cattle, and it has been very fairly admitted that this injury was so trifling that it was not the real object of the action. The real object was to restrain the repetition of the trespass. Therefore it appears to me that, primâ facie, this action is not within the rule. But it is said that the defendant not only trespassed, but asserted a right to the land. Can that assertion of right convert that which was not an injury to property into an injury to property? It appears to me that it cannot. If it had been intended that all actions to restrain an assertion of right should be within the rule this would have been expressly mentioned. I think that what is meant is that there must be injury of a physical character to property, and that it is immaterial whether the defendant does or does not assert a title.

1882

GOODHAND v. AYSCOUGH.

Then it is said that in *Chapman* v. *Midland Ry. Co.* (1) the Queen's Bench Division seem to have taken a somewhat different view, and to have thought that the assertion of a title by the defendant would make some difference. But that case was afterwards taken to the Court of Appeal, and I do not find that any of the judges of that Court adopted the view of the Divisional Court. This being so, I suggest to the judges of the Divisional Court that the present case is not within the rule, and consequently that the higher scale of costs does not apply, and with that expression of my opinion I leave the matter to them.

Dec. 13. The Queen's Bench Division (Hawkins, J., and Watkin Williams, J.), adopted the opinion of Fry, J., and affirmed the order.

Order affirmed.

Solicitors for plaintiff: *Collyer-Bristow, Withers, & Russell, for Bell & Ingolby, Louth.*

Solicitor for defendant: *Toynbee, for Toynbee, Larken, & Toynbee, Lincoln.*

W. L. C.

Nov. 25.

[CROWN CASE RESERVED.]

THE QUEEN *v.* RATCLIFFE.

Criminal Law—Rape on Girl between the ages of twelve and thirteen years—Statutes 24 & 25 *Vict. c.* 100, *ss.* 48, 51; 38 & 39 *Vict. c.* 94, *s.* 4—*Rape.*

The statute 38 & 39 Vict. c. 94, s. 4, which enacts that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour," &c., does not operate to prevent a conviction for felony, under 24 & 25 Vict. c. 100, s. 48, of a person committing a rape upon a girl between those ages.

Reg. v. *Dicken* (14 Cox, C. C. 8) followed.

THE following case was stated by Fry, J.

"At the Winter Assize for the county of Chester it was proved that Josiah Ratcliffe violated Ellen Ratcliffe, a girl then above the age of twelve and under the age of thirteen years. He was indicted for rape, and also for a misdemeanour. The jury found

(1) 5 Q. B. D. 431.

the prisoner guilty on both indictments, and separate verdicts were returned on them.

"By 38 & 39 Vict. c. 94, s. 4, it is enacted as follows: "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour." This enactment is a repetition of the 51st section of the statute 24 & 25 Vict. c. 100, with two variations, (1) that the ages of twelve and thirteen are respectively substituted for those of ten and twelve years, and (2) that the words "whether with or without her consent" are introduced.

"In the case of *Reg.* v. *Dicken* (1), Mellor, J., held that, notwithstanding the above section, the violation of a girl between the ages of twelve and thirteen, without her consent, was rape and felony.

"The prisoner was undefended; but I felt so much doubt as to the validity of a conviction for felony under the circumstances that I postponed sentence till the next assizes, and state the question for the opinion of this court.

"I doubted (1) whether the clause referred to does not plainly declare that the violation of a girl of the specified age without her consent is a misdemeanour; (2) whether the self-same offence could at the same time be a misdemeanour and a felony; and (3) whether any real distinction could be drawn between violently and against her will carnally knowing a girl, and carnally knowing a girl without her consent.

"I beg to refer to the note on this point in Mr. Justice Stephens' Digest of the Criminal Law, p. 173, ed. 1877."

The question reserved for the opinion of the Court was whether sentence could be passed for felony on the prisoner.

No counsel appeared.

THE COURT (Lord Coleridge, C.J.; Pollock, B.; Lopes, Stephen, and Watkin Williams, JJ.) affirmed the conviction.

Conviction affirmed.

(1) 14 Cox, C. C. 8.

1882
Nov. 25.

[CROWN CASE RESERVED.]

THE QUEEN *v.* CARR AND WILSON.

Criminal Law — Larceny from British ship at Foreign Port — Feloniously receiving Property stolen from British Ship at Foreign Port—Admiralty, jurisdiction of—Shipping, Criminal jurisdiction over British Ship afloat abroad—High Seas, Criminal jurisdiction on.

Certain bonds or valuable securities were stolen from a British ocean-going merchant ship whilst she was lying afloat, in the ordinary course of her trading, in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship:—

Held (by Lord Coleridge, C.J., Pollock, B., Lopes, Stephen, and Watkin Williams, JJ.), that the prisoners could be properly tried and convicted at the Central Criminal Court in this country, as the larceny took place within the jurisdiction of the Admiralty of England.

THE following case was stated for the opinion of this Court by North, J.

"The prisoners were tried before me at the Old Bailey, at the session of the Central Criminal Court, on the 13th of September, for felony in respect of twenty-five bonds (20*l.* each), of Egyptian Preference Stock, two bonds of $1000 (ten shares), and $500 (five shares), respectively, of the Illinois Railway, and thirty other bonds of Egyptian Unified stock.

"The first count charged the prisoners with stealing these securities upon the high seas within the jurisdiction of the Admiralty of England; the second count charged that they being British subjects within the jurisdiction of the Admiralty of England, upon the British ship *Avalon*, then being in a certain foreign port to wit, the port of Rotterdam, stole the same securities; the third count charged them with larceny of those securities within the jurisdiction of the Central Criminal Court; the fourth count charged them with receiving the same securities within the jurisdiction of that Court, well knowing them to have been stolen;

and the fifth and sixth counts respectively charged them with having been accessories after the fact to the theft and the receiving respectively of the same securities, by persons unknown.

"The material facts proved, were as follows:

"1. On the 12th of July last the above-mentioned Egyptian Preference Stock and Illinois bonds, were made up by Messrs. Kelker & Co., bankers at Amsterdam, into a parcel, which was marked outside 'value 50*l.*' and was addressed to Messrs. Mercia, Backhouse, & Co., in London. The Unified stock was made up into another parcel similar to the first, except that it was marked outside as 'value, 100*l.*' These parcels were of a class known as 'valued parcels.' They were traced clearly from Amsterdam to Rotterdam, to the office of Messrs. Pieters & Co., the agents there of the Great Eastern Railway Company, on whose behalf they were received.

"2. There was evidence that these two parcels were (with two others) taken from Pieters & Co.'s office, by a man employed by them for that purpose, and placed by him on board the steam-ship *Avalon*, about half-past five P.M. on the same 12th of July.

"3. The *Avalon* is a British vessel, registered at Harwich, and sailing under the British flag. She is about 240 feet in length, with a gross tonnage of 670 tons, and draws about ten feet six inches of water when loaded. She is the property of the Great Eastern Railway Company, and is regularly employed by them in their trade between Harwich and Rotterdam. On the evening in question she was lying in the river Maas, at Rotterdam, about twenty or thirty feet (the captain also described it as 'about the breadth of the court') from the quay and against a 'dolphin,' a structure of piles for the use of the company's ships only projecting from the quay for the purpose of keeping the vessels off the quay. She was moored to the quay in the usual manner.

"4. The place where the *Avalon* was lying was in the open river, sixteen or eighteen miles from the sea. There is not any bridge across the river between that point and the sea. The tide ebbs and flows there, and for many miles farther up the river. The place where the *Avalon* was lying at the dolphin is never dry, and that vessel would not touch the ground there at low water. The Admiralty chart shewing the river Maas from Rotterdam to

1882

THE QUEEN v. CARR.

the sea, was put in evidence at the suggestion of the counsel for the prisoners, and was proved by the captain of the *Avalon* to be correct.

"5. While the *Avalon* was lying at the dolphin, as above described, persons were allowed to pass backwards and forwards between her and the shore without hindrance.

"6. The *Avalon* sailed for England the same evening, about six o'clock, and arrived at Harwich the following morning. Upon her arrival the two valued parcels above-mentioned (and one of the other parcels) were at once missed, and upon inquiry it was found that they had been stolen. The parcel containing the Unified stock and the third parcel, have never since been traced; but the parcel containing the Egyptian Preference Stock and the Illinois bonds, was found in the prisoners' possession on the 1st of August.

"7. The prisoners are British subjects.

"8. It was contended for the prisoners, that there was no evidence upon which the jury could find them guilty upon the counts charging them with stealing the securities. I was of that opinion and so directed the jury, and the prisoners were accordingly acquitted upon those counts.

"9. It was also contended for the prisoners, that unless the jury found that the securities had been stolen from on board the *Avalon*, the prisoners must be acquitted, as if they had been stolen after leaving Pieters & Co.'s office, and before reaching the ship, the offence of stealing them was one which this Court had not jurisdiction to try and therefore the prisoners could not be tried here for receiving. According to the case of *Reg.* v. *John Carr* (one of these prisoners) reported in vol. lxxxvii. p. 46 of the Sessions Papers at the Central Criminal Court, and the cases there cited, I took this view and directed the jury, that unless they were satisfied that the securities had been taken from the *Avalon*, they must acquit the prisoners. They found both the prisoners guilty.

"10. I was not asked to leave, and did not leave any question to the jury, whether the securities were stolen before or after the *Avalon* commenced her voyage from Rotterdam. There was no evidence upon which the jury could have found that the theft

occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed.

"11. It was further argued on the prisoners' behalf, that even if the securities had been stolen from the *Avalon*, there was nothing to shew that they had been taken by a British subject, and therefore the case did not come within the Acts 17 & 18 Vict. c. 104, s. 267, 18 & 19 Vict. c. 91, s. 21, or 30 & 31 Vict. c. 124, s. 11; and the thief was amenable to the law in Holland only, and, further, that the case of *Reg.* v. *Anderson* (1) was no authority to the contrary, inasmuch as the prisoner in that case though a foreigner, was one of the crew of a British vessel, and therefore owed allegiance to the law of England, and upon that ground could be tried here. The counsel of the Crown did not dispute that the offender might be tried in Holland, but insisted that he might be tried here also.

"12. I expressed my opinion that if the *Avalon* had at the time when the securities were stolen been sailing up or down the river Maas, the person who took them, whether an Englishman or a foreigner, could clearly have been tried here upon the authority of *Reg.* v. *Anderson* (1), that the law is the same whether the ship be anchored or sailing, as appears from the cases of *Rex* v. *Jemot* (2) and *Rex* v. *Allen* (3), where the vessels were lying in port, and which cases are referred to by Lord Blackburn with approval in *Reg.* v. *Anderson* (1); and that it could not make any legal difference whether the vessel was made fast to the bottom of the river by anchor and cable, or to the side of the river by ropes from the quay. I also expressed my opinion that, although the fact that the prisoner in *Reg.* v. *Anderson* (1) was one of the crew was referred to more than once in the judgment of Bovill, C.J., it was not mentioned by any of the other judges, and was not the ground of the decision; and that it made no difference in the present case whether the securities stolen from the *Avalon* were taken by one of the crew, or one of the passengers, or by a stranger from the shore.

"13. I directed the jury accordingly, telling them that if they came to the conclusion that the securities were taken from the

(1) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

(2) Cited Arch. C. Pl. 16th ed. 395.

(3) 1 Mood. C. C. 494; 7 C. & P. 664.

1882

THE QUEEN v. CARR.

ship, the taking them was an offence which could be tried here, and that if so, the prisoners could now be tried here for receiving and could be found guilty of that offence if the jury thought the facts proved warranted such a finding. I stated at the same time that I should, if necessary, reserve the point for the consideration of this Court.

"14. With respect to the receiving, no difficulty of law arose and no point was reserved.

"15. The jury found both prisoners guilty upon the fourth count. I postponed passing sentence until the opinion of the Court is given, and the prisoners remain in custody.

"The question for the opinion of this Court is whether, under these circumstances, there was any jurisdiction to try the prisoners at the Old Bailey for the offence of which they have been found guilty."

Sir H. Giffard, Q.C. (*Gorst, Q.C.*, and *Tickell*, with him), for the prisoner Carr. The facts shew that the theft was in Holland, whilst the ship was moored to the quay at Rotterdam. The thief was probably a Dutchman, and the ship was at the time in a Dutch highway, in the streets in fact of Rotterdam. It is not a case of larceny by a person on board a British ship on the high seas.

The direction is, that if a Dutchman stole from the ship where she lay in Holland, an English subject here may be guilty of receiving. This cannot be, unless the Dutchman who stole can be tried here. The prisoners are British subjects, but that is quite immaterial—nationality does not give jurisdiction. The question is whether the stealing is a felony triable here. If the stealing is not within the jurisdiction, the receivers are not triable here. The ship ceased when moored to the quay to have the character of a floating island separated from any country, it became part of Holland, it was no longer sailing under the British flag. If two British subjects fought on board a Dutch lighter in the Thames, are they to be tried in Holland? Yet if this case is to be decided against the prisoners that would seem to follow. *Reg.* v. *Anderson* (1) is a case of an offence by one of the crew of a British ship, one who by contract brought himself under English law.

(1) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

[STEPHEN, J. You say an element of *Anderson's Case* (1) is wanting here, that the thief was not a member of the crew.]

Yes, that is material. The thief was not bound by our law. The law of the flag will not apply when the ship is no longer under the flag, but is moored in Rotterdam, and under Dutch law, eighteen miles up a Dutch river.

In *Rex* v. *Allen* (2) the basis of decision is the fact that the prisoner was one of the crew of the *Aurora*, of London. That ship was a floating island attached to no country. This is a new case, and it is sought to exercise jurisdiction here which in truth belongs to Holland.

E. Clarke, Q.C. (*Grain*, with him), for the prisoner Wilson. It would seem that in *Reg.* v. *Anderson* (1) much reliance was placed upon the fact that the prisoner there was one of the crew of a British ship. There is no jurisdiction to try a foreigner for what he does in his own country, or in its ports forming part of such country.

[LORD COLERIDGE, C.J. Would not a Dutchman going on board this ship at Rotterdam have the protection of the flag?

POLLOCK, B., referred to *Reg.* v. *Sattler*. (3)]

A thief wrongfully and secretly entering this ship at Rotterdam would be a trespasser, and it is submitted that he could not thus entitle himself to the protection of the flag.

Poland (*Goodrich*, with him), for the prosecution. The question turns not upon the nationality of the person, nor upon his position, as one of the crew or as a passenger, or as one invited on board, but upon the character of the ship and its position. It is a fallacy to say this ship is part of Holland. It came to Rotterdam by sea, and goes into Dutch jurisdiction; but it never ceased to be subject to and to be within the jurisdiction of the Admiralty of England. So long as a ship is afloat, as a ship, in waters where great ships do go upon their voyages, it is clearly within Admiralty jurisdiction. In *Reg.* v. *Anderson* (1) the case of *The United States* v. *Hamilton* (4) is cited, and that shews how and when the Admiralty jurisdiction ceases. In that case the ship was in a

(1) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

(2) 1 Mood. C. C. 494; 7 C. & P. 664.

(3) 1 Dears. & B. C. C. 525.

(4) 1 Mason, 152.

1882

THE QUEEN v. CARR.

dock. This ship was in the course of its trade afloat within the ebb and flow of the tide, and the thief, if a Dutchman, could have been seized and brought to this country for trial, just as much as if he had been an English subject and one of the crew. But it is suggested the attachment to the land may make a difference. It would be absurd to say that an attachment by an anchor has an effect differing from that by a rope or a gangway. A man who voluntarily goes on board a British ship afloat comes within and is subject to the jurisdiction, it matters not whether he goes to work on it as a carpenter, or to sail in it as a sailor or passenger, or goes uninvited as a thief. By statute 28 Hen. 8, c. 15, offences committed in or upon the sea, or in any haven, river, creek, or place where the Admiralty has or pretends to have jurisdiction, are to be tried in this country. That jurisdiction has never been cut down in extent. Blackburn, J., in *Reg.* v. *Anderson* (1) says: "From the earliest times in England, and I think abroad also, it has been established that the jurisdiction of the Admiralty extends over vessels, not only when they are in the open sea but also when in places where great ships do generally go." The matter depends not on mode of attachment of the ship, but on its position, that is, whether it is in a place where the jurisdiction extends. In *Thomas* v. *Lane* (2) it is pointed out that Admiralty jurisdiction as to torts depends on the locality. In *Rex* v. *Allen* (3) membership of the crew was not the ground of the decision. In *Reg.* v. *Keyn* (4) the case of *Reg.* v. *Anderson* (1) is cited, but without any suggestion that it was decided upon the ground that the prisoner was one of the crew. The law of the flag governed this ship, and all on board had the protection of that law, and were subject to it; it was a working ship under the command of its captain when the theft took place. [He also referred to *Rex* v. *Jemot.* (5)]

Sir H. Giffard, Q.C., in reply. Crimes are of necessity local in their nature. The crime in question, it is contended, was committed within foreign, and not within English, jurisdiction.

(1) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.
(2) 2 Sumner, 1.
(3) 1 Mood. C. C. 494.
(4) 2 Ex. D. 63.
(5) Russell on Crimes, 5th ed. p. 11 in notes; *Times* newspaper of Feb. 29, 1812.

When a ship is at sea it is under its flag, and the law of the flag prevails; when a ship is in dock undergoing repair in a foreign country, the flag is hauled down and the foreign law governs. The ship in this case was not under its flag; the flag is always hauled down in port; it was attached to Holland and under Dutch law. It may well be that one who has by choice elected to come under our law, as, for example one of the crew, is bound by that law, but here the thief was a Dutchman who had nothing to do with the ship, a trespasser in fact. No reliance can be placed on the reports of the old cases, they are vague and in some points plainly wrong. The note in Russell on Crimes of *Rex* v. *Jemot* (1) must be wrong in calling the offence piracy.

[LORD COLERIDGE, C.J. The newspaper note calls it a case of larceny. It seems to have been so from a British ship in a natural harbour in Cuba, and the trial appears to have been before Le Blanc, J., and Sir William Scott, at an Admiralty Sessions at the Old Bailey, with the result that the prisoner was sentenced to death.]

E. Clarke, Q.C., in reply, referred to the judgment of Lindley, J., in *Reg.* v. *Anderson* (2); to *Reg.* v. *Lesley* (3); and *Reg.* v. *Sattler*. (4)

LORD COLERIDGE, C.J. There were on board an English ship, which lay in the Maas moored to the quay at a "dolphin," certain bonds, the subject of larceny. The ship was thus attached to the land of the country of Holland, but was in a place within the ebb and flow of the tide where she could and did lie afloat. There was no actual proof of who stole the bonds, but the evidence pointed to the stealing having taken place whilst the vessel was moored as I have stated, and before she left her moorings to proceed upon her homeward voyage by sea. How the bonds came to this country we know not, nor is it for our present purpose material. It is enough to know that they were here received under circumstances which, apart from the questions now to be

(1) Russell on Crimes, 5th ed. p. 11 in notes; *Times* newspaper of Feb. 29, 1812.

(2) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

(3) 1 Bell, C. C. 220.

(4) 1 Dears. & B. C. C. 525.

1882

THE QUEEN v. CARR.

Lord Coleridge, C.J.

considered, clearly warranted a conviction of the receivers. The conviction is for the offence of feloniously receiving these bonds knowing them to have been stolen. Now it is obvious that the prisoners cannot be convicted here unless the stealing took place within the jurisdiction of our courts. The question has therefore to be considered whether the ship was, when the bonds were stolen, within the jurisdiction of the Admiralty, so that the thief, if he had been caught, could have been tried at the Old Bailey. The exact point has never yet, it would seem, been decided. None of the cases cited absolutely cover the precise question now before us. There are, indeed, two questions involved: first, was the ship within the jurisdiction of the Admiralty, so that the stealing took place locally within the jurisdiction of the court which tried the prisoners; and secondly, was the person who stole a person subject to the jurisdiction of that court. The first, a question of place; the second, a question of person. The place is clearly within the old description of a place within the ebb and flow of the tide where great ships are accustomed to go. The ship was accustomed to go there in its trading; it was there in the course of trading. There is enough to make it clear that the place is within the jurisdiction. Without saying that the reports are as exact as could be wished, it appears from the reports of *Rex* v. *Allen* (1) and *Rex* v. *Jemot* (2) that those cases were such that to draw any tangible and sensible distinction between them and the case now before the Court would be difficult. Again, in *Reg.* v. *Anderson* (3) the ship was some forty or fifty miles up the Garonne, yet it was held that our courts had jurisdiction. I cannot distinguish that case from the present as to this first point.

With regard to the second point, is there anything in the personality of the thief, who thus stole from a place within the jurisdiction, to render him not triable here? It is true that in *Reg.* v. *Anderson* (3) great stress is laid by judges upon the fact that the prisoner was one of the crew. In the report of that case in the Law Journal I find Bovill, C.J., reported as insisting on the right of this country to legislate for persons who come on

(1) 1 Mood. C. C. 494; 7 C. & P. 664.

(2) Russell on Crimes, 5th ed. p. 11 in note.

(3) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

board its ships. The fact that the prisoner was of the crew is prominently noticed, but not one of the judges says that had it been otherwise their judgment would have been other than it was. The true principle is, that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and liable to the punishments it inflicts upon those who there infringe its requirements. I can draw no distinction between those who form part of the crew, those who come to work in or on the ship, those who are present involuntarily, or those who come voluntarily as passengers. If on board in such case, our law protects them against outrage and wrong, and from that it follows they are liable to the obligations by it imposed. It is said that these bonds may have been stolen by a Dutch subject who came, perhaps without a right, on board for a short time, and who then went back with his plunder to Rotterdam. If so, if the ship had sailed for this country before he got ashore with the bonds thus stolen, instead of after, and brought him to this country against his will, I say he could have been tried and convicted here. The conviction must be affirmed.

POLLOCK, B. I also think the conviction should be affirmed. The broad question is whether upon this trial of an indictment for receiving, it was proved that the property was so stolen as to give the Court trying it jurisdiction over the thief and theft. Does the rule apply enunciated by Blackburn, J., in *Reg.* v. *Anderson* (1): "All persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation." It is admitted that if the theft had been in mid-ocean the conviction would have been proper. It is said, that lying alongside the town the English jurisdiction ceased. I think the distinction is not one of substance. If the crew had been discharged and the ship had been under repair, the circumstances would have been very different, but here there was a large British ship taking or discharging its cargo and passengers in its ordinary

(1) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

1882

THE QUEEN v. CARR.

course within tidal waters "where great ships do go." To draw distinctions such as we have been invited to do would be to fritter away sound law.

LOPES, J. The conviction should be affirmed. The position of the ship was within the jurisdiction, she was on the high seas, "where great ships do go." It is said the thief may not have been a member of the crew. I think it matters not whether he was or not. The true test is, was he at the time on an English ship protected by, and answerable to, English law.

STEPHEN, J. I am of the same opinion. The whole question is, was the theft within the jurisdiction of the Admiralty of England? Ever since the time of Richard II., its jurisdiction has extended to where great ships go. Many statutes regulate procedure for applying that jurisdiction, but the jurisdiction itself has, in its extent, so far as I can learn, remained unnarrowed. Of the cases cited, *Rex* v. *Jemot* (1) bears out that jurisdiction, it shews it is not limited to waters outside ports. It was a case of an English sailor punished for what he did on an English ship in port in Cuba. *Rex* v. *Allen* (2) is to a similar effect. *Reg.* v. *Anderson* (3) again is an authority, and it goes further, it affects both place and person, for in that case it was a foreigner who was tried, not a British subject, but it was a foreigner one of the crew; whilst here we have to decide, following these authorities, whether jurisdiction extends to the English ship placed where great ships usually go as part of their voyage for the purposes of its trading, and to all persons who happen to be on board such ship, so as to be entitled to the protection of English law. I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment of the ship to land, or to inquire when the flag is lowered or when hoisted. Such rules would be to make law without meaning, and to narrow well founded and beneficial

(1) Russell on Crimes, 5th ed. p. 11 in note.

(2) 1 Mood. C. C. 494; 7 C. & P. 664.

(3) Law Rep. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

jurisdiction. I prefer the obvious and wholesome principle that jurisdiction and protection in these cases are co-extensive. 1882

THE QUEEN v. CARR.

WATKIN WILLIAMS, J. I agree.

Conviction affirmed.

Solicitor for prosecution: *The Solicitor to the Treasury.*
Solicitors for prisoners: *Goldberg & Langdon.*

C. D.

FRIEND, APPELLANT; TOWERS, RESPONDENT. *Dec.* 1.

Parliament—Borough Vote—Description of Qualification—"Dwelling House"—Amendment under Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 12, 13.

The respondent had a sufficient qualification for the borough franchise as the occupier of a dwelling house under the Representation of the People Act, 1867, s. 3, but not under the Reform Act, 1832, s. 27, the yearly value of the house being under 10*l.*

The respondent's qualification was described in the list as "house." The respondent being objected to, the revising barrister was of opinion that such description was sufficient, but he amended it by adding the word "dwelling" to the word "house," and retained the respondent's name on the list:—

Held (without determining whether the description as it originally stood was sufficient), that the case came within the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 12, and the revising barrister had power to make the amendment, and his decision was therefore correct.

APPEAL from the decision of the revising barrister for the city of Exeter.

The facts were as follows:—The appellant duly objected to the name of the respondent being retained on the occupiers' list (Form D., No. I, Division 1) for a parish in the said city, on the ground that the value of the qualifying property was insufficient. The nature of the qualification in the third column of the list was described as "house."

The clear yearly value of the property was less than 10*l.*

The respondent had during the whole of the qualifying period been in occupation of the property as tenant, and had occupied the same as his dwelling house.

It was contended by the appellant that the description "house"

1882

FRIEND v. TOWERS.

was by ss. 5 and 8 and the schedule and note thereto of the Parliamentary and Municipal Registration Act, 1878, so appropriated to the franchise created by the Reform Act, 1832 (2 Wm. 4, c. 45), s. 27, as to exclude proof under it of a "dwelling house" within s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and that the barrister had no power to amend by substituting "dwelling house" for "house."

It was contended for the respondent that the description of the qualification was correct, or if not, that the revising barrister had power to amend by prefixing the word "dwelling" to the word "house" under s. 28 of the Parliamentary and Municipal Registration Act, 1878.

The revising barrister decided that the term "house" was sufficient to include "dwelling house," and was not so appropriated to the franchise created by the Reform Act, s. 27, as to exclude proof under it of a "dwelling house" under s. 3 of the Representation of the People Act, 1867, and although it was not absolutely necessary, he should, and he accordingly did, amend the description by adding the word "dwelling" to the word "house." He therefore retained the name on the list. The appeal was a consolidated appeal, the cases of various other voters specified in a schedule thereto being precisely similar.

Charles, Q.C. (*Bucknill*, with him), for the appellant. The note P to the schedule of the Parliamentary and Municipal Registration Act, 1878, expressly specifies the term "dwelling-house" as the proper description of the qualification under s. 3 of the Representation of the People Act. When two franchises overlap, the claim may, no doubt, be in words that would apply to either. So where a man occupies a dwelling-house over the value of 10*l.* and is qualified by the Reform Act, under which the qualification is "house," he may describe his qualification as "dwelling-house," though that term is also appropriate to a claim under the Representation of the People Act. He merely thereby specifies the species as well as the genus, which is a needless particularity but cannot vitiate the claim. See *Townshend* v. *Overseers of Marylebone* (1); *Ford* v. *Boon*. (2) It is otherwise where the

(1) Law Rep. 7 C. P. 143. (2) Law Rep. 7 C. P. 150.

specification of the species of house is essential, as is the case with the inhabitant occupiers' franchise.

By sub-s. 13 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, the revising barrister cannot amend so as to alter the nature of the qualification, unless the case comes within sub-s. 12. It is contended that the case does not come within that sub-section, because that sub-section only applies when in the judgment of the revising barrister the matter stated in a list or claim, or proved to the revising barrister, is insufficient to constitute a qualification of the nature or description stated or claimed. Here the barrister found the qualification sufficient under the unamended description. He obviously did not intend to amend under sub-s. 12, but to amend by way of more accurately defining the qualification under sub-s. 13 of s. 28, and this he could not do.

[LORD COLERIDGE, C.J. Is the question, under which sub-section he acted, material, so long as he had power to do what he did? He makes the amendment ex majori cautelâ on the assumption that he may be wrong in thinking it unnecessary.]

Bompas, Q.C., for the respondent, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister was correct. I pronounce no opinion on the ingenious argument of the appellant's counsel with regard to the description of the qualification as it originally stood. It appears to me that sub-s. 12 of s. 28 of 41 & 42 Vict. c. 26, exactly meets the present case, and that it was intended by that section that the revising barrister should have power to do the very thing that he has done in this case.

The object of the section clearly is that, when the matter proved to exist to the satisfaction of the revising barrister is sufficient to constitute some qualification given by the statutes relating to the franchise, but such qualification is described in terms applicable to a qualification of some other nature or description, the revising barrister, being satisfied that the voter is entitled to the franchise, shall amend the description. It seems to me that the present case is exactly within that section, and that it therefore becomes unnecessary to deal with the difficulties suggested by the argu-

1882

FRIEND v. TOWERS.

ment of the appellant's counsel on the question whether the term "house" was a sufficient description of the inhabitant occupier's qualification under the Representation of the People Act.

FIELD, and STEPHEN, JJ., concurred.

Decision affirmed.

Solicitor for appellant: *S. D. Hamilton, for Friend.*
Solicitors for respondent: *J. E. Fox & Co., for J. Brutton Ford.*

E. L.

Dec. 14.

BLAIBERG *v.* PARKE.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *subs-s.* 2—*Affidavit filed on Registration—Description of Residence of Attesting Witness.*

The affidavit filed on registration of a bill of sale in pursuance of the Bills of Sale Act, 1878, s. 10, sub-s. 2, contained in the introductory part describing the deponent an accurate description of his residence. The body of the affidavit contained, inter alia, the following statements:—"I (the deponent) was present and saw the said (grantor of the bill of sale) duly execute the said bill of sale on the 15th day of December, 1881. The name subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of this deponent. I am a solicitor of the Supreme Court, and reside at ——;" there being thus no description of the residence of the attesting witness in the body of the affidavit:—

Held, that the affidavit was sufficient to satisfy the requirements of the Bills of Sale Act, 1878, s. 10, sub-s. 2, in respect of the description of the residence of the attesting witness.

By MANISTY, J. The body of the affidavit sufficiently incorporated by reference the description of the residence of the attesting witness contained in the introductory part.

By NORTH, J. It is sufficient that the description of the occupation and residence of the attesting witness should be found in the introductory part of the affidavit.

INTERPLEADER issue in respect of goods taken in execution, the plaintiff, the claimant, being the grantee under a bill of sale given by the execution debtor, Frank Ricardo Francis, and the defendant being the execution creditor. The following facts appeared at the trial before Cave, J. The bill of sale was executed by the grantor on the 15th of December, 1881, and was attested by "Simon Abraham Kisch, of No. 3, Chancery Lane, solicitor." The affidavit filed on registration of the bill of sale in pursuance

1882

BLAIBERG v. PARKE.

of the provisions of the Bills of Sale Act, 1878, s. 10 (omitting the paragraphs not material to the point raised in the case) was as follows:—"I, Simon Abraham Kisch, of No. 3, Chancery Lane, in the City of London, make oath and say as follows. 1. The paper writing hereto annexed and marked A is a true copy of a bill of sale and of every schedule or inventory thereto annexed or therein referred to and of every attestation of the execution thereof as made and given and executed by Frank Ricardo Francis. 3. I was present and saw the said F. R. Francis duly execute the said bill of sale on the 15th day of December, 1881. 5. The name Simon Abraham Kisch subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of me this deponent. 6. I am a solicitor of the Supreme Court, and reside at ——."

Upon these facts it was contended on behalf of the defendant that the bill of sale was void as against him, on the ground that the affidavit did not satisfy the requirements of the 2nd sub-section of the 10th section of the Bills of Sale Act, 1878, because it did not contain a sufficient description of the residence of the attesting witness. The learned judge ruled that the affidavit was sufficient, and accordingly a verdict was entered for the plaintiff.

A rule nisi having been obtained for a new trial on the ground of misdirection,

Dec. 13. *A. T. Lawrence*, shewed cause. The statement of the attesting witness's residence in the heading or introductory part of the affidavit is a sufficient compliance with the provisions of the Bills of Sale Act, 1878, s. 10, sub-s. 2. In Chitty's Archbold, 11th ed. vol. ii. p. 1606, under the heading, "Affidavits (Deponent's Abode)," in reference to the rule 138, H. T., 1853, which provides that "the addition and true place of abode of every person making an affidavit shall be inserted therein," cases are cited to shew that the addition and place of abode may be given in the introductory part of the affidavit. In *Ex parte Mackenzie, Re Bent* (1), where the affidavit made upon the registration of a bill of sale seems to have been in similar terms to that in the present case, it was held that the description of the witness

(1) 42 L. J. (Bkcy.) 25.

1882

BLAIBERG v. PARKE.

if insufficient was cured by reference to the attestation clause of the bill of sale where he was sufficiently described. (1) In *Pickard* v. *Marriage* (2) no objection was made to an affidavit in the same form as the present so far as one of the attesting witnesses was concerned; the only objection being that there was no description anywhere of the other attesting witness. The deposition applies to the whole of the contents of the affidavit, and a false statement in the introductory part might be made the subject of an assignment of perjury: *Jarrett* v. *Dillon*. (3)

Yelverton, and *Vennell*, supported the rule. To support this affidavit as sufficient it must be shewn that the part which precedes the words "as follows" is part of the matter sworn to. It is submitted that such is not the case. *Blount* v. *Harris* (4) is in point as shewing that a distinct statement of the residence on oath is necessary. In *Jones* v. *Harris* (5) where it was held that the description in the affidavit might be supplemented by that in the bill of sale, Cockburn, C.J., refers to *Pickard* v. *Bretz* (6) in terms which shew that the affidavit can only be supplemented by something in the bill of sale to which it expressly refers. There is not in this affidavit any such reference to the description in the bill of sale. The case of *Pickard* v. *Bretz* (6) is a distinct authority that the reference to the description in the bill of sale by the affidavit must, in order to be sufficient, incorporate it as part of the affidavit. *Sharpe* v. *Birch* (7) and *Ford* v. *Kettle* (8) are to the same effect.

Dec. 14. The following judgments were delivered:—

NORTH, J. In this case my Brother Cave held that the affidavit made by an attesting witness to a bill of sale, to which an objection had been made that it did not contain a sufficient description of his residence, was sufficient, and a verdict was entered for the

(1) The affidavit in the case cited is not set out in the report, but the original affidavit was referred to at the request of the Court, and found to contain in the body of it a distinct statement with regard to the residence of the attesting witness. The case, therefore, was not really similar to the present case.

(2) 1 Ex. D. 364.

(3) 1 East, 18.

(4) 4 Q. B. D. 603.

(5) Law Rep. 7 Q. B. 157.

(6) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(7) 8 Q. B. D. 111.

(8) 9 Q. B. D. 139.

claimant accordingly. This rule raises the question whether this decision was correct, and in my opinion it was. The material parts of the affidavit are the introductory words and the 6th paragraph. [His Lordship here read these parts of the affidavit.] The occupation of the deponent is sufficiently described as "solicitor." It was not disputed at the trial that as a matter of fact the words, "No. 3, Chancery Lane, in the city of London," so aptly and fully describe his residence that if they had been found at the end of the 6th paragraph the affidavit would have been sufficient. But from some cause—probably gross carelessness on the part of the solicitor or his clerk—the description of the residence is not filled in there.

It was contended before us that the attestation clause to the bill of sale fully describes the residence of the attesting witness, and that this clause is referred to in the affidavit; and several cases are cited to shew that this is enough to satisfy the requirements of the Act. But I do not think that these cases establish the point for which they are cited. In my opinion the contents of the attestation clause are not verified by the affidavit or incorporated therein, either directly or indirectly, and the witness could not have been convicted of perjury upon this affidavit for any wilful misstatement in his description which might have been found in the attestation clause. I may add that in the case of *Ex parte Mackenzie, Re Bent* (1), cited by Mr. Lawrence, upon which Mr. Justice Cave acted, that point does not seem to have been argued; and I think that there are many other cases not quite consistent with that, of which *Brodrick* v. *Scalé* (2) is one.

But there were other points raised on the part of the holders of the bill of sale which I now proceed to deal with. The 10th section of the Bills of Sale Act, 1878, sub-s. 2, requires that a copy of any bill of sale with its attestation clause, "together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale," shall be filed within seven days. I may add in passing that so

(1) 42 L. J. (Bkcy.) 25.

(2) Law Rep. 6 C. P. 98.

1882

BLAIBERG v. PARKE.

North, J.

far as relates to the present question the words of the Act of 1854 are identical with those I have read. Now the earlier words in sub-s. 2 might be read as if the description need not be in the affidavit, by reason of the introduction of the two words "a description" into that sub-section, but the provision at the end as to filing the copy bill of sale and affidavit does, I think, shew that the description must be found somewhere in the affidavit itself, or (which is the same thing) in some document incorporated by reference into the affidavit.

The question then is whether, supposing the words "and reside at ——," at the end of paragraph 6 had been omitted from the affidavit, the affidavit would have contained a sufficient description. I think it would.

In the case of *Routh* v. *Roublot* (1) the description of the attesting witness was found in the introductory words of the affidavit and not in the body of it, and the affidavit was held sufficient. I gather from the Law Reports that the description was contained in the introductory words only of the affidavits in the case of *Pickard* v. *Marriage* (2) cited yesterday, and in the case of *Button* v. *O'Neill* (in the Court of Appeal) (3), and I believe that this has been so in many other cases also.

But there are three other cases I must refer to. The first is *Allen* v. *Thompson* (4), in which, a verdict having been found for the claimant under a bill of sale, a rule to enter a verdict for the defendant was applied for upon three grounds. Upon the first a rule was granted and made absolute upon argument, and is reported in 1 Hurlstone and Norman, 15; but that is not material to the present question. The decision refusing the rule on the two other points is only reported in 2 Jurist (N.S.) 451. The second point was that the affidavit was made by a person who described himself as "R. W. Patton, clerk to Mr. Keighley, 73, Basinghall Street," without adding London or any other place, and it was objected that this was not a compliance with the General Rules of Hilary Term, 1853, requiring that the addition and place of abode of every person making an affidavit should be inserted therein. The third point was that though the person

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240.
(2) 1 Ex. D. 364.
(3) 4 C. P. D. 354.
(4) 2 Jur. (N.S.) 451.

(1) 5 Jur. N.S. 578.

1882

BLAIBERG v. PARKE.

North, J.

making the affidavit was the attesting witness to the bill of sale the affidavit did not contain a separate statement that he as the attesting witness to the instrument had such a description. It was objected that this did not satisfy the requirements of the statute that the affidavit should contain a "description of the residence and occupation" of the attesting witness.

The Court in refusing a rule on the second and third points, said that the description "73, Basinghall Street" was reasonably certain, and that the allegation "I, A. B., of such a place, swear, &c." was equivalent to an oath that he resided at that place.

The next case is *Ex parte Torkington* (1), before the Court of Appeal. It was a case under rule 15 of the Bankruptcy Rules, 1870, which provides that a debtor summons against a person indebted to a partnership authorized to sue in the name of a public officer may be sued out by a public officer on behalf of the partnership on his filing an affidavit according to the form in the schedule (where however no such form is found) stating that he is such public officer and is authorized to sue out such summons. A debtor summons was taken out by John Parker, who was in his affidavit described as, but did not otherwise expressly swear that he was, one of the registered public officers of the National Bank. Many objections were taken to the affidavit and summons, but one of them was that the affidavit was insufficient by reason of Parker not swearing to the fact that he was the registered public officer of the bank, and this objection was treated as a good one. If matters rested there, this decision would be a strong authority against the view I take. But about a month afterwards the same point precisely came again before the Court of Appeal in *Ex parte Lowenthal, Re Lowenthal.* (2) In that case an affirmation (in the place of an affidavit) was made by one Barber, who, after describing himself as the manager and registered public officer of the Sheffield Banking Company, proceeded to make certain statements not including a description of the character he filled. The same objection was taken as in *Ex parte Torkington* (1) which was cited, as was also *Allen* v. *Thompson.* (3) The objection was overruled. Mellish, L.J., said in his judgment, "It is objected

(1) Law Rep. 9 Ch. 298. (2) Law Rep. 9 Ch. 324.
(3) 2 Jur. (N.S.) 451.

1882

BLAIBERG v. PARKE.

North, J.

that the affirmation did not comply with the 15th rule, which says that the public officer is to make an affidavit stating that he is such public officer. On the authority of *Allen* v. *Thompson* (1) there is no doubt that it is sufficient that he described himself in the affirmation as the public officer of the bank. That case was not cited in *Ex parte Torkington* (2), in which case there were also other irregularities in the affidavit upon which the decision of the Court was founded." Lord Cairns, L.C., also dealt with this point by saying "It is said that the affirmation does not state expressly that Barber was the public officer. I think that, as he is described as the public officer, the fact is sufficiently stated. If he was not really the public officer, he would have been liable on the affidavit for false swearing."

These cases fully bear out the view which I took yesterday, that, if a sufficient description be found in the introductory portion of the affidavit, that is sufficient.

With respect to one of the points argued by Mr. Lawrence, viz. that a deponent could be convicted of perjury, if he gave a wilfully false description of himself in the introductory part of an affidavit, it will be seen that the decision in *Allen* v. *Thompson* (1) and the observations of Lord Cairns in *Ex parte Lowenthal* (3) go the whole length contended for. I must admit that during the argument I entertained considerable doubt upon this point, and I do not yet feel entirely satisfied about it. In the case of *Reg.* v. *Chapman* (4) the same point arose, but the judges abstained from deciding it. For present purposes, however, this seems to me quite immaterial, for the cases I have referred to shew that a sufficient description may be found in the introduction to an affidavit; and all that the statute requires is that it shall be found somewhere in the affidavit; and it does not make it imperative that the description be found in such part of the affidavit that perjury can be assigned upon it.

One question remains; whether the fact that the words "and reside at ——" are found in the affidavit makes any difference in this case. I think not. They do not contain any misstatement; they cannot deceive or mislead; and though it is only by

(1) 2 Jur. (N.S.) 451.
(2) Law Rep. 9 Ch. 298.
(3) Law Rep. 9 Ch. 324.
(4) 2 C. & K. 846.

great carelessness that they are found there, they cannot, in my opinion, do any harm, for it is obvious from the course taken at the trial that the contest here has not been occasioned by the existence of those words in the affidavit.

MANISTY, J. I agree with the conclusion arrived at by my Brother North, but I am not sure that I agree with all the premises on which he bases that conclusion. I do not wish to be understood to decide that in my opinion a description given only in the introductory part of the affidavit is sufficient, or that the description is sufficient whether perjury can be assigned upon it or not. I decide on the ground that this affidavit does in the body of it sufficiently refer to and incorporate the description in the attestation clause and the introductory part of the affidavit. I think the case of *Routh* v. *Roublot* (1) referred to by my Brother North is a sufficient authority, and, indeed, conclusive on that point. It is to be observed that in the present case the deponent making the affidavit required by the statute is likewise the attesting witness to the bill of sale, and his description and residence are mentioned in the attestation clause in the same terms as in the introductory part of the affidavit. The effect of the decision in *Routh* v. *Roublot* (2) is that the affidavit need not necessarily state in terms that the deponent is identical with the attesting witness, if it can be gathered with reasonable certainty from it that that is so, and therefore that the occupation and the residence given as those of the deponent are those of the attesting witness. It seems to me that the principle of that case is applicable to the present. There the description of the deponent's occupation and his residence were mentioned in the introductory part of the affidavit and the attestation clause of the bill of sale, as is the case here, and so far the cases are exactly similar.

What then was there in the body of the affidavit in that case to connect the deponent with the person mentioned in the attestation clause to the bill of sale and to incorporate the description in the attestation clause and the introductory part of the affidavit? It seems to me that the third paragraph of the affidavit in the case was sufficient for the purpose. The deponent there said, " I

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240. (2) 1 E. & E. 850.

1882

BLAIBERG v. PARKE.

Manisty, J.

was present and did see the said Charles Bowtell in the said bill of sale mentioned, and whose name is signed thereto, sign, seal, and deliver the same, &c." And it was held on the strength of that statement that it sufficiently appeared that the deponent was the attesting witness, and also that his description was as given in the attestation clause and the introductory part of the affidavit. So in this affidavit the deponent described in the introductory part says, "I Simon Abraham Kisch, was present, and saw the said F. R. Francis duly execute, &c." What does the word "I" in that statement mean? It means Simon Abraham Kisch, as previously described. In this respect the cases are precisely similar. It was suggested that the blank left in the sixth paragraph of this affidavit raised a doubt, but I do not think that this can alter the effect of the remainder, or prevent the application of the principle of *Routh* v. *Roublot* (1) if the residence is sufficiently described without that paragraph. The case which seems at first sight most strongly against the sufficiency of this affidavit is that of *Pickard* v. *Bretz*. (2) In that case the bill of sale described the grantor as "John Bretz, of No. 9, George Street, Minories, in the city of London, hotel keeper," and the affidavit described him as "the said John Bretz, of No. 9, George Street," omitting the description "hotel keeper," and it was held that the affidavit did not sufficiently verify the occupation of the grantor of the bill of sale. I confess it hardly seems to me that the effect of the words "said John Bretz," in the affidavit was sufficiently considered in that case. No reference was made to those words either in the argument or judgment. I should not like to say that the case was wrongly decided, though I think it might have been worthy of more consideration whether the use of the word "said" did not suffice to incorporate the description in the bill of sale on the same principle as that applied in *Routh* v. *Roublot*. (3) On the whole, I am of opinion that the rule should be discharged.

DENMAN, J. I also am of opinion that this rule should be discharged. There is some difficulty in reconciling all the cases on the subject, and, although both my learned Brothers

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240.

(2) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(3) 1 E. & E. 850.

think that *Routh* v. *Roublot* (1) is an authority for discharging this rule, they differ with regard to the grounds upon which it is applicable. I do not know that it is necessary to discuss that question very minutely, for it seems to me clear that upon whatever grounds that decision rested it is applicable to the present case. In that case the heading of the affidavit contained the description of the occupation and residence of the deponent, and in the body the deponent swore that he had witnessed the execution of the bill of sale. My Brother Manisty thinks that the effect of the statement so sworn to in the body of the affidavit is to incorporate the description of occupation and residence contained in the heading of the affidavit. If so, the case is an authority for our decision in the present case, for here the words are perhaps rather more capable of being so construed than in *Routh* v. *Roublot*. (2) My Brother North does not think that the subsequent portion of the affidavit does incorporate the description in the heading or in the attestation clause of the bill of sale, but nevertheless thinks that the affidavit is sufficient by reason of the description in the heading. I am very much disposed to think after hearing the full argument which has been addressed to us on the subject that it is not required that there should be in the affidavit a verification on oath of the description of the occupation and residence of the attesting witness, and that it would be sufficient if the affidavit, in accordance with the rules of 1853, had a heading giving the description of the occupation and residence of the person making it. But if that be not so, I am inclined to think that after the strong dictum of Lord Cairns the right conclusion is that the description in the heading forms part of the affidavit itself. He says in *Ex parte Lowenthal* (3), "First it is said that the affirmation does not state expressly that Barber was the public officer. I think that as he is described as the public officer, the fact is sufficiently stated. If he was not really the public officer, he would have been liable on that affidavit for false swearing." So it seems to me that when the deponent swears that the contents of his affidavit are true, the heading of the affidavit describing him as it does here, he may be indictable

(1) 1 E. & E. 850. (2) 1 E. & E. 850; 28 L. J. (Q.B.) 240.
(3) Law Rep. 9 Ch. 324.

1882

BLAIBERG v. PARKE.

Denman, J.

for perjury, provided he does so corruptly and with intent to deceive, in the event of such description being untrue. But it does not seem to me necessary that I should express a decided opinion on that point, for whatever view may be taken of the case of *Routh* v. *Roublot* (1), it seems to be an authority directly in favour of our decision in this case.

Rule discharged.

Solicitors for claimant: *Moresby, White, & Co.*
Solicitor for defendant: *Parke.*

E. L.

Nov. 16.

READ *v.* ANDERSON.

Gaming—Betting—Employment of Agent to bet in his own Name—Implied Authority to pay Bet—When Authority is Irrevocable—8 & 9 *Vict. c.* 109, *s.* 18.

The employment of an agent to make a bet in his own name on behalf of his principal implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable.

FURTHER CONSIDERATION.

The facts and arguments are fully stated in the judgment.

July 3, 1882. *McCall* (*W. G. Harrison, Q.C.*, with him), for the plaintiff.

Petheram, Q.C., and *Metcalfe Dale*, for the defendant.

Cur. adv. vult.

Nov. 16, 1882. HAWKINS, J. This action was brought to recover 175*l.*, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners thereof. It was tried before me without a jury.

The plaintiff is a turf commission agent, and a member of Tattersall's Subscription Room. The defendant is a licensed victualler at South Shields.

According to well-established usage, known to the defendant, a

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240.

turf commission agent instructed by an employer to back a horse backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and, on the settling day after the event, he receives or pays as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost.

For some time before the Ascot Meeting, 1881, the plaintiff had, according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balances thereof.

On the Friday of the Ascot Meeting (17th of June, 1881), the plaintiff being at Ascot received from the defendant a telegram to this effect: "Put me fifty on Limestone, first race; pony all Archer's mounts; fifty Sword Dance, hundred Elf King, Wokingham; hundred Red Rag filly, Castle Stakes. Reply."

This telegram, though handed in at South Shields at 12.8 P.M. and received at Ascot at 1.29 P.M., did not reach the plaintiff until 1.40 P.M., at which time the first race for the day, in which Limestone ran, was over, that race having been run at half-past one; for that race, therefore, Limestone could not be backed.

The second race of the day was the Wokingham Stakes, which was set for two o'clock. For that race Sword Dance and Elf King, mentioned in the telegram, and Valentino, ridden by F. Archer, were entered; the plaintiff accordingly, acting on the telegram, backed in his own name Elf King for 100*l.*, Sword Dance for 50*l.*, and Valentino (as one of Archer's mounts) for 25*l.* Neither of these horses won; the consequence was that these bets, to the amount of 175*l.*, the subject of the present action, were lost.

At 2.15 P.M. the plaintiff handed in at the telegraph office at Ascot the following message to the defendant: "Nothing done Limestone or Archer's mount the first race—your message came ten minutes after the race." In this message, which was not delivered to defendant until 3.14 P.M., it will be observed nothing is said about the second race; but at 3.5 P.M. the plaintiff telegraphed the result of that race to defendant in these terms: "Your

1882

READ v. ANDERSON.

message received; Viridis won." This was evidently a mistake, for no such animal as Viridis ran in the race. The Wokingham was won by Wokingham, by St. Albans out of Viridis. The mistake however is immaterial. This message was not received at South Shields until 3.35 P.M., and then defendant had received information by telegram from another person of the result of the first two races.

On the evening of the same day the defendant repudiated these bets and all liability in respect of them, by the following letter to the plaintiff:—

"Exchange Vaults, South Shields,
"June 17, 1881.

"Mr. Read,—I find your message was not handed in before the race for the Wokingham Stakes; I had the result of the race ten minutes before I received your reply. I enclose you the message, which please return to me; they were both handed in at 2.15, that being fifteen minutes after the order of running; so I shall consider I am not on anything for two first races to-day, as I cannot stand the messages being sent away after the race is over to say I am on.

"In haste, I remain, yours respectfully,
"J. Anderson."

In reply to this letter the plaintiff wrote to defendant as follows:—

"Dear Sir—The reason you did not get your message about Elf King, S. Dance, and F. Archer mounts sooner was on account of so many messages being sent about the results of the Wokingham Handicap.

"The following bets I took for you. I inclose you the names:

100—800	Elf King	Jacob, A.
50—225	S. Dance	Robinson, J.
25—150	Valentine	Masterman."

With this letter the plaintiff sent a detailed account of the various bets he had made for the defendant during the Ascot meeting, and of the amounts which he would have to receive from and pay to the defendant. In number there were between fifty and sixty, and the account shewed that upon these the defendant's

losses, including the bets in question, amounted to 1420*l.* 0*s.* 5*d.*, whilst his winnings were 705*l.* 17*s.* 4*d.*, leaving a balance of 714*l.* 3*s.* 1*d.* to be paid by the defendant.

The defendant in reply, on the 19th of June, inclosed a cheque for 539*l.* 3*s.* 1*d.*, as being the real balance due, and with regard to the difference, 175*l.*, wrote thus:—"I cannot think about paying the other, as I have other people to please as well as myself, and paid for reply, and you say you received message ten minutes too late for first race, but you cannot give any excuse for not answering it until the next race was over. I am quite satisfied that had any of them won I should not have been on." Other correspondence followed, but is not material for the question I have to decide.

On the settling day the plaintiff paid the three bets in question to the winners of them, had he not do so he would have been a "defaulter" within the meaning of the 3rd rule of Tattersall's new subscription room; and if upon complaint made to the committee of the room the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it, and by the 50th of the rules of racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets he would, until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the rules of racing as to entering and running horses, the consequences of becoming a defaulter would therefore have been very serious to the plaintiff.

For the defendant it was contended, first, that the authority to make the bets in question was subject to an express condition that the defendant should be informed by the plaintiff by telegram delivered at the telegraph office before the race was run that he was "on," that is, that the bets had been made on his behalf. Secondly, that if there was no such express condition there was a universal usage and custom importing a condition to that effect into every authority conveyed by telegram to back horses, when a reply was paid; and that inasmuch as no reply telegram was handed in by the plaintiff for the defendant until a quarter of an hour after the race was run the defendant was entitled to repudiate the bets as he did by his letter.

1882

READ v. ANDERSON.

The defendant further insisted that the bets were wagering contracts; that he had never given any authority to the plaintiff to pay them; and even if he had, that authority was revoked before the money was actually paid.

I am of opinion, and I find as a fact, that there was no such express condition, nor is there any such usage or custom as contended for. The payment for a reply to the telegram requesting the plaintiff to back the horses no doubt was an intimation to the plaintiff that the defendant desired to be speedily informed of what had been, or was about to be, done on his behalf; but it did not constitute a condition to the plaintiff's authority to make the bets. As a matter of fact, where it can be done, a message in reply is no doubt usually handed in at the office before the race; but no universal custom or usage was established before me making it imperative upon the commission agent to do this as a condition to his binding his customer. Long and unreasonable delay in replying until after the race is run, and the event known, might under certain circumstances afford strong ground for suspecting that in fact the agent did not make the bets on behalf of his customer, and was fraudulently attempting to saddle him with the loss; there is, however, no evidence before me to justify such an imputation in the present case. It was clearly established to my satisfaction that the bets were made bonâ fide by the plaintiff for the defendant in pursuance of the telegram, and that the plaintiff paid those bets in discharge of his liability to the persons with whom they were made. The objections of fact therefore fail.

This brings me to the consideration of the legal objections to the plaintiff's claim. I am of opinion that neither of them can be sustained. At common law wagers were not illegal, and before the passing of 8 & 9 Vict. c. 109 actions were constantly brought and maintained to recover money won upon them. The object of 8 & 9 Vict. c. 109 (passed in 1845) was not to render illegal wagers which up to that time had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honour might dictate. Accordingly it was by the 18th section enacted in these words: "All contracts or agreements, whether by parol or in writing, by

way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager." There is nothing in this language to affect the legality of wagering contracts, they are simply rendered null and void; and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the statute. I will mention only one or two: In *Fitch* v. *Jones* (1) it was expressly so decided, Erle, J., saying, "I think that the defendant might without violating any law make a wager. If he lost he might without violating any law pay what he had lost." In *Hill* v. *Fox* (2) the same learned judge said that the parties do not violate any law by making a bet; but the law will not assist the winner in enforcing payment of it. In *Ex parte Pyke, In re Lister* (3), I observe the Master of the Rolls, at p. 757, is reported to have spoken of gaming or betting being illegal. I feel sure that learned judge must have been misunderstood. See his judgment in *Lynch* v. *Godwin* (4), in which he expressly stated that a bet was void but not illegal.

But although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorise anybody else to do for him; and if by his request or authority another person pays his lost debts, the amount so paid can be recovered from him as so much money paid to his use.

In *Rosewarne* v. *Billing* (5) the defendant had employed the plaintiff to make in his own name wagering contracts respecting mining shares; and the plaintiff accordingly made them and paid certain differences on such shares, and brought his action to recover from the defendant (his employer) the money so paid. In giving judgment for the plaintiff, Erle, C.J., said, "It is clear that though the defendant was not liable to pay the sums due under these wagering contracts, he might do so if he chose. And if a party loses a wager and requests another to pay it for him he is liable to the party so paying it for money paid at his request."

(1) 5 E. & B. 238.
(2) 4 H. & N. 359.
(3) 8 Ch. D. 754.
(4) 26 Solicitors' Journal, p. 509.
(5) 15 C. B. (N.S.) 316; 33 L. J. (C.P.) 55.

1882

READ v. ANDERSON.

Oldham v. *Ramsden* (1875) (1) is to the same effect. So is *Ex parte Pyke, In re Lister* (2), in which an appeal by the trustee under Lister's bankruptcy against the registrar for allowing a proof by Barrett for money lent and paid by him at Lister's express request, in discharge of lost bets at Tattersall's, was dismissed by the Court of Appeal.

The request or authority to make such payments may be either express, or it may be implied from usage or from the nature of the dealings between the parties themselves. If a person authorizes another to bet for him in his own name, an implied request to pay if the bets are lost is involved in that authority. For this too, there is abundance of legal sanction. In *Bubb* v. *Yelverton* (3) which was a suit for the administration of the estate of the Marquis of Hastings deceased, Lord Charles Ker claimed a sum of 850*l.* for money paid for the Marquis for bets made and lost on his account, it was held by Lord Romilly, M.R., that a request to bet implied an authority to pay the bets if lost, and that Lord Charles Ker was entitled to prove against the estate of the Marquis for the amount paid: see also *Oldham* v. *Ramsden* (4) and *Rosewarne* v. *Billing* (5), and lastly, *Lynch* v. *Godwin.* (6) I am not aware that this case has been reported in any of the regular reports at present.

In the present case I find as a fact that at the time the defendant gave the authority to make the bets, he gave also an implied authority to pay them if they should be lost.

The defendant however contended that, assuming wagering contracts not to be illegal, and that a person who employs another to bet gives that other implied authority to pay, such authority may be revoked at any time before payment is actually made, and that it was in fact revoked in the present case. Upon the evidence before me I am of opinion, and find as a fact, that the defendant did not revoke the authority to pay; on the contrary, by settling the rest of the account he seems to me to have confirmed that authority to pay whatever bets were honestly made

(1) 44 L. J. (C.P.) 309.
(2) 8 Ch. D. 754.
(3) 19 W. R. 739.
(4) 44 L. J. (C.P.) 309.
(5) 15 C. B. (N.S.) 316; 33 L. J. (C.P.) 55.
(6) 26 Solicitors' Journal, p. 500.

10 Jur. N.S. 497

and lost on his account; and the correspondence satisfies me that he only desired to raise the question whether these particular bets were honestly made or not. Assuming, however, contrary to my opinion, that there was a revocation in fact, I am of opinion such revocation was inoperative in law. I am not aware that hitherto this point has been judicially decided, although it was shortly mooted in *Rosewarne* v. *Billing*. (1) I think it right, therefore, to state my reasons for the conclusion to which I have arrived.

As a general rule a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable, that is though it may be revoked in fact, that is to say by express words, such revocation is of no avail. In *Smart* v. *Sandars* (2) Wilde, C.J., said "the result appears to be, that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." See also Story on Agency, ss. 476, 477.

In the present case the authority to pay the bets if lost was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost, the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bets the authority to bet might beyond all doubt have been revoked; but the instant the bets were made and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words, the case may be stated thus. If a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that

(1) 15 C. B. (N.S.) 316; 33 L. J. (C.P.) 55. (2) 5 C. B. 895.

1882

READ v. ANDERSON.

authority does the act, and so incurs the liability, the authority ceases to be revocable.

The cases of *Hampden* v. *Walsh* (1) and *Diggle* v. *Higgs* (2) were cited for the defendant in support of his contention that the authority to pay was revocable. Those cases do not assist him—they were actions brought against stakeholders to recover back deposits or wagers, and the revocation of the authority to pay over to the winner was before the money was paid over; in each of those cases the stakeholders must be taken to have received the deposits subject to the legal obligation to return them to the depositors if demanded back before payment over. The stakeholder's authority in those cases was coupled with no interest, and his position was unaffected by the revocation. Those cases are therefore not like the present, and do not fall within the exception to the rule I have referred to.

The opinion I have expressed as to the irrevocability of the authority to pay lost bets applies only to cases where the agent by the principal's authority makes the bets in his own name so as to be personally responsible for them. If an agent were simply to make bets in the name of his principal, I am far from saying that the principal might not repudiate authority to pay at any time before payment was actually made; for his non-payment of bets made for him and in his name would not render his agent liable as a defaulter or subject such agent to loss or obloquy. It is not necessary, however, to decide this point now.

The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act, which in the ordinary course of things will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied by law: see Story on Agency, ss. 337–340, and I think it signifies nothing that such obligation is not enforceable in a Court of justice if the non-fulfilment of it would entail serious inconvenience or loss upon the agent, for he is not bound to submit to these things for his employer if, by doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can in the case of bets lost, by paying them; and he is not bound in

(1) 1 Q. B. D. 189. (2) 2 Ex. D. 422.

my opinion to incur the odium and consequences of repudiating his honourable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet there was a tacit agreement on the part of the defendant to indemnify him against all the ordinary consequences of his so doing.

In pleading, such a contract of indemnity might in substance be thus described—in consideration that the plaintiff as a turf commission agent would at the request of the defendant and as his agent make for him in his the plaintiff's own name certain bets subject to and according to the usages of Tattersall's, the defendant promised that he would indemnify the plaintiff against all the consequences of making such bets according to such usages, &c. Many cases might be cited to shew that such a contract, though made with reference to and in contemplation of wagering contracts, is not in itself a wagering contract: see *Bubb* v. *Yelverton* (1); *Johnson* v. *Lansley* (2); *Beeston* v. *Beeston*. (3)

The result is, that if a person employs another to bet for him in the agent's own name, an authority to pay the bets if lost is coupled with the employment; and although before the bet is made the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet the authority to pay it if lost becomes irrevocable.

For the reasons I have stated, I am of opinion that the plaintiff is entitled to my judgment for the amount he claims, and I give judgment accordingly. On full consideration I have determined to allow such amendments (if any) in the pleadings as may be necessary to raise all the legal questions involved in the case in order that it may be determined upon its true legal merits. The costs will follow the event of the action.

Judgment for the plaintiff.

Solicitor for plaintiff: *T. R. Apps.*

Solicitors for defendant: *J. & C. Scott, for T. T. Dale, South Shields.*

(1) Law Rep. 9 Eq. 471. (2) 12 C. B. 468.

(3) 1 Ex. D. 13.

A. M.

1882

Nov. 23.

LAMB *v.* MUNSTER.

Practice—Interrogatories as to Publication of Libel—Refusal to Answer—Incrimination—Privilege.

An objection to answer interrogatories which is made by affidavit on the ground of the tendency of the answer to criminate the person interrogated may be valid, although not expressed in any precise form of words, if, from the nature of the question and the circumstances, such a tendency seems likely or probable. In an action for libel the defendant pleaded a denial of the publication, and to interrogatories asking him, in effect, whether he published the libel he stated by his affidavit in answer: "I decline to answer all the interrogatories upon the ground that my answer to them 'might' tend to criminate me":—

Held, that his answer was sufficient.

MOTION to rescind an order of Watkin Williams, J., in chambers.

The action was for libel, and the defendant by his statement of defence denied the publication of the alleged libel. Interrogatories being administered asking him whether he did not publish the libel, his answer was: "I decline to answer all the interrogatories upon the ground that my answer to them might tend to criminate me." A Master ordered a further and better answer; but his order was rescinded by the order of the learned judge.

Gore, for the plaintiff. The affidavit stating that the answer to the interrogatories might tend to criminate the defendant is insufficient, he must swear that he is advised or believes that his answer will have that effect: *Scott* v. *Miller*. (1) He is in the same position as if in the witness-box, and is bound to say upon his oath that he believes his answer will be evidence against him in such a way that he is protected from answering: see *Fisher* v. *Owen*. (2)

Woollett (*A. A. Prankerd*, with him), for the defendant, shewed cause. The argument for the plaintiff would, if successful, entirely take away from the defendant his privilege. He has sworn that the answer might tend to criminate him. That is equivalent to expressing his belief. He is entitled to the privilege of a witness,

(1) 28 L. J. (Ch.) 584; (2) 8 Ch. D. 645.

and that is stated by James, L.J., in *Ex parte Schofield, In re Firth* (1) to be the privilege of claiming protection from answering questions put to him, on the ground that by answering he might expose himself to criminal proceedings. [He was stopped.]

FIELD, J. I think the learned judge at chambers was right, and that the answer to the interrogatories is sufficient. The point raised is important, for the principle of our law right or wrong is that a man shall not be compelled to say anything which criminates himself. Such is the language in which the maxim is expressed. The words "criminate himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal." It is said that a man is not bound to do so. There have been various authorities on the question how the point is to be raised. Suppose a witness in the box declines to answer a question. He is asked why? He answers, "Because it may tend to criminate me." But the judge tells him that he must go further and swear that he believes the answer will tend to criminate him. He answers "I do not know, but I believe it may do so." The judge tells him that he must go further and say that he is advised that the answer may tend to criminate him. He perhaps replies, "I have no one to advise me in whose advice on the subject I should trust." Then it becomes the duty of the judge to look at the nature and all circumstances of the case and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness. If he said, "I think it may," or "It may," or "It might," or "I believe it will," or "I am advised it will;" I should not regard the form of words, but look to see whether answering would be likely to have or probably would have such a tendency to criminate, and bearing in mind the cardinal rule that a man shall not be compelled to criminate himself, I should almost prefer a man to be careful and say the answer might tend to criminate, and I should be slow to commit him to prison for not doing that which the law says he is not bound to do. In this case the tendency to criminate is evident. The statement of claim charges the

(1) 6 Ch. D. 230.

1882

LAMB v. MUNSTER.

defendant with the publication of a false and malicious libel, the remedy for which is either by action or indictment. It would be competent to the plaintiff, after having got an answer to the interrogatories, to indict the defendant for libel, and the answer might establish the very first step the prosecutor would have to prove.

I do not think the authorities lay down any principle on which this application for a further answer can be rested. In *Fisher* v. *Owen* (1) the point was only whether the question could be put, and there are many, amongst whom is Brett, L.J., who think it is a mistake to allow a man to refuse to answer on the ground that his answer might tend to criminate him, for this reason that although a learned judge may regard the answer without being influenced by it, yet, on the interrogatories and the refusal of the defendant to answer them being read to a jury, who are asked whether they can doubt that the defendant really did what he was asked about, they would at once find that he did. In *Allhusen* v. *Labouchere* (2) Brett, L.J., doubts whether the equity doctrine is perfectly applicable to the courts of common law. But as the Lord Justice says: "That, however, is past controversy, and the question has been settled by the Court of Appeal." A decision of Lord Hatherley when Wood, V.C., was cited, and Mr. Woollett produced a case in which there were the same words as those under discussion, but I find in the cases that the learned judges used words such as "will," "may," or "might," indifferently, without laying any stress on the verb. I think there is no substance in the objection to the present answer, and that it is quite sufficient. It is very desirable that the rule should be in favour of the principle of law.

STEPHEN, J. I am of the same opinion. I entirely agree with my learned Brother. In every case the principle itself has to be considered, and it would not be well to lay down any kind of strict rule as to the particular form of words in which persons are to be compelled to express their opinion as to whether or not the answer to questions would criminate them. When the subject is fully examined, it will I think be found that the privilege extends to protect a man from answering any question which

(1) 8 Ch. D. 645. (2) 3 Q. B. D. 654, at p. 662.

"would in the opinion of the judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge": Stephen's Dig. of the Law of Ev. 3rd ed. art. 120, p. 121. That is what I understand by the phrase "criminating himself." It is not that a man must be guilty of an offence and say substantially, "I am guilty of the offence, but am not going to furnish evidence of it." I do not think the privilege is so narrow as that, for then it would be illusory. The extent of the privilege is I think this: the man may say, "If you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth." I do not think the cases cited go any further than this, viz., that the Court which has to decide must be satisfied on the oath of the witness that he does object on that ground, and that his objection is bonâ fide. In *Reg.* v. *Boyes* (1), a case not cited in argument, but a somewhat remarkable one, a man called as a witness on an information for bribery refused to answer any question as to his knowledge of the defendant, on the ground that by answering he might criminate himself, a pardon under the great seal was thereupon handed to the witness, who, still refusing, was compelled by the judge to answer. This ingenious point was taken, viz., that the pardon was not pleadable to an impeachment by the House of Commons, and that Boyes when he refused to answer after the pardon was handed to him did so under the belief of an impeachment to which the pardon would be no answer. Cockburn, C.J., says, "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made malâ fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur." But he goes on to say that "the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his

(1) 1 B. & S. 311; 30 L. J. (Q.B.) 301.

1882

LAMB v. MUNSTER.

being compelled to answer," and also that the danger must be real and appreciable. That is, on the whole, the principal authority for my view of this case, that a man is not to be forced to answer any question if the witness swears that the answer "may" or "will," or "would" endanger him (I care not for the form of words in which he expresses it) and in the opinion of the judge the answer may, not improbably, be of such a nature as to endanger him. The defendant in the present case is asked whether he has published a libel, and has refused to answer on the ground that it "might" endanger him, and I think that a person who wished to annoy him and cause expense might endanger him, and I cannot say it is an improbable contingency. Having regard to the authority I have cited, it seems to me that a man may say, "I think the answer would tend to criminate me," meaning thereby "would tend to bring a criminal prosecution against me for a crime of which I am in fact innocent, but of which I might on the facts be very probably accused."

Order affirmed.

Solicitors for plaintiff: *Palmer & Bull.*
Solictor for defendant: *W. Brewer.*

J. R.

Dec. 5.

WARDER *v.* SAUNDERS AND ANOTHER; AND ORELLANA AND OTHERS.

Practice—Bankruptcy of Plaintiff—Refusal of Trustee to proceed with Action—Stay of Proceedings.

Where the plaintiff is adjudicated bankrupt after action brought and his trustee declines to proceed with the action, it may be stayed by an order in chambers, and the defendant need not plead the bankruptcy in bar.

MOTION to rescind an order of Cave, J., at chambers.

On the 8th of March, 1882, the plaintiff issued a writ, and on the 26th of August, 1882, filed a statement of claim against the defendants Saunders and the defendants Orellana, Collis, and Cuffe, their agents, for false representations whereby the plaintiff was induced to buy and pay for the goodwill of a school. A statement of defence was delivered and interrogatories administered and answered. On the 24th of October, 1882, the plaintiff

was adjudicated bankrupt, and on the 15th of November, 1882, a trustee of his property was appointed.

A summons was taken out by the defendants Saunders to dismiss the action, the trustee made an affidavit of the fact of the bankruptcy and of his appointment, and that he had perused the statement of claim, statement of defence, and answer to interrogatories in the action, and had also made inquiries as to the action from both the solicitor for the plaintiff and the solicitors for the defendants Saunders, and after duly considering the same had elected not to proceed with the action, and that he was of opinion that there was not a good cause of action. At the hearing of the summons, it being admitted that the plaintiff had been adjudicated bankrupt since action brought, Cave, J., ordered that the action be stayed until further order without costs.

Douglas Walker, for the plaintiff. The action does not abate on bankruptcy: Order L., r. 1. Before the Judicature Act, where the cause of action passed from a bankrupt to his trustee the bankrupt could proceed, and need not even give security for costs. But the defendant would then plead the bankruptcy in bar of the action, and the plaintiff would confess the plea and be entitled to judgment for his costs up to the time of pleading, and it seems that the effect of Order XX., rr. 1–3, is the same: *Foster* v. *Gamgee* (1); *Champion* v. *Formby*. (2)

Bankruptcy must be pleaded in bar and not in abatement, and the only mode in which the defendant can take advantage of the bankruptcy of the plaintiff after action brought, is by a plea in bar, which would entitle the plaintiff to confess judgment and get his costs.

The Chancery practice may have differed from the common law, and in *Jackson* v. *North Eastern Ry. Co.* (3) the Court of Appeal held that where a sole plaintiff becomes bankrupt he cannot continue the action. But there "the bankruptcy was before the Judicature Act came into operation and before the new rules were in force," per Baggallay, L.J. The sole question there was whether the particular orders and notice of trial should be dis-

(1) 1 Q. B. D. 666. (2) 7 Ch. D. 373.
(3) 5 Ch. D. 844.

1882

WARDER v. SAUNDERS.

charged. The plaintiff has an interest in the action; he might recover a sum which would satisfy his creditors and leave a surplus for himself. The defendants can cite no rule under the Judicature Act depriving him of his right to proceed until a plea puis darrein continuance.

Anderson, for the defendants Saunders. The plaintiff has no locus standi, and his solicitors should be ordered to pay the costs of this appeal. By Order L., r. 2, in case of the bankruptcy of any party to an action the Court may, if it be deemed necessary for the complete settlement of all questions involved in the action, order that the trustee be made a party or served with notice on such terms as the Court shall think just, and shall make such order for the disposal of the action as may be just. The trustee here declines to proceed, and the order which is just therefore is to dismiss the action, and the order of Cave, J., should be amended so as to dismiss the action with costs, instead of merely staying it without costs. A defendant whose interest has ceased pending the suit cannot obtain payment of his costs: *Wymer* v. *Dodds* (1); and a plaintiff ought not to be in a better position.

Claude Plumptre, for the defendants Orellana, Collis, and Cuffe, also asked for costs against the plaintiff's solicitor; but the Court intimated that they would not be granted.

D. Walker, replied.

DENMAN, J. The order of the learned judge must be affirmed. I will not express a confident opinion on the question whether he might not even have dismissed the action; but I can conceive a case in which possibly that would be going too far. There might be such a state of circumstances as a supersession of bankruptcy when the order merely to stay would be most convenient. But the ground on which we are asked to reverse the order of the learned judge is, I think, untenable. This case is not, in my opinion, the kind of case contemplated by Order XX. r. 3. Here the parties have actually come to issue, and at that stage it is brought to the notice of a learned judge that the plaintiff has a trustee in bankruptcy who, if anybody, is the person having the right to sue, and he has formed a strong opinion that it is not

(1) 11 Ch. D. 436.

beneficial to the creditors to proceed and has elected not to proceed. I do not think that this case falls within either the letter or spirit of any of the rules; but the power of the Court to stay actions is not confined to cases which have been expressly provided for by the legislature or in rules. Cases have arisen, and may from time to time arise, which on general principles of good sense and justice, and that litigation for unreasonable purposes may not be allowed to proceed, learned judges have stayed actions. That is what Cave, J., has done in this case. He thought there could be no good sense or object in letting this plaintiff go on harassing the defendants with this action. I think my Brother Cave has acted within his power, and according to reason and good sense. He dismissed the appeal without costs. This appeal is from a reasonable order, and therefore should be dismissed with costs.

NORTH, J. The order is less favourable to the defendants than it might have been. I think the learned judge might have stayed the action altogether. That is the practice in Chancery, and although it was not so at common law it is the most convenient, and it has been decided that when there is a conflict of practice the most convenient rule is to be followed. Further, I think the case is governed by *Jackson* v. *North Eastern Ry. Co.* (1), for as I read the judgments of Jessel, M.R., James, L.J., and Baggallay, L.J., they all agreed in the view which they took, and that was not restricted by Baggallay, J., stating, as a second reason for his conclusion, that the bankruptcy in that case took place before the Judicature Act came into operation, and before the new rules were in force. I quite agree with the Master of the Rolls that the bankrupt cannot continue the action as plaintiff. It is said that this is a hardship, for that if the plaintiff were allowed to proceed he might recover a large sum for his creditors and a surplus for himself. But, on the other hand, he might not, and we must look at the case practically. The trustee has to get in the assets, and to distribute them amongst the creditors. It is impossible that he can do so when an action affecting the amount of the assets is pending under the control of the bankrupt. I

(1) 5 Ch. D. 844.

1882

WARDER v. SAUNDERS.

think the trustee has a right to say that a claim which is good shall be enforced, and a claim which is not good shall be abandoned, and the estate wound up on that footing. The balance of convenience is not in favour of keeping the action open if the trustee declines to proceed, and I think that practically it is best not to give the plaintiff the opportunity of keeping it open. On the authority of *Jackson* v. *North Eastern Ry. Co.* (1) I should dismiss this action. However, I entirely agree with the decision of Cave, J., and I think the appeal should be dismissed with costs.

Order affirmed, with costs.

Solicitors for plaintiff: *Gedge, Kirby, Mellett, & Morse.*

Solicitors for defendants Saunders: *Stokes, Saunders, & Stokes.*

Solicitor for defendants, Orellana, Collis, and Cuffe: *J. Beet Collins.*

J. R.

Dec. 18.

KENT *v.* THE WORTHING LOCAL BOARD OF HEALTH.

Highway—Nuisance—Cover of Water Valve—Projection of—Wearing away of Road—Local Board—Water and Highway Authority, Liability of—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *s.* 149.

The iron cover of a valve connected with a water main was properly fixed in a highway by the defendants, but in consequence of the ordinary wearing away of the highway the valve cover projected an inch above it. The plaintiff's horse using the highway stumbled over the valve cover and was hurt. In an action against the defendants, who were both the water authority and the highway authority, for the injury to the horse:—

Held, that it was the duty of the defendants to make such arrangements that works under their care should not became a nuisance to the highway, and that the plaintiff was entitled to recover.

APPEAL from the Brighton county court.

The case was stated in the judgment of the Divisional Court as follows:

"This is an appeal from the decision of the county court judge delivered in the county court at Brighton on the 17th of July, 1882. The facts were as follows: the Worthing Local Board are both the water authority and the highway authority for Worthing.

(1) 5 Ch. D. 844.

1882

KENT v. WORTHING LOCAL BOARD.

They put down in one of the highways within their district an iron valve cover, the top of which, when all was in proper order, was level with and formed part of the roadway. The ordinary wear and tear of the highway caused the roadway adjacent to the valve cover to wear down to such an extent that after about three months wear the cover, unless the road was kept level, would project about an inch above the road. It was the duty of the local board as surveyors of the highway to keep the road level so as to prevent the valve cover from projecting. They neglected to do so. The valve cover projected, and the plaintiff's horse stumbled over it and fell, injuring himself and another horse of the plaintiff's to the extent of 21*l*. The question was whether this sum could be recovered from the local board.

"The learned county court judge was of opinion that it could not. He found that the valve cover was proper in itself, that it was originally properly fixed, and that at the time of the accident it was in proper order. Hence, in their capacity of water authority, the local board had committed no breach of duty. In their character of surveyors of highways they had committed a breach of duty by omitting to repair the road, but for this the learned county court judge considered on the authority of *White* v. *Hindley* (1) they were not liable to be sued."

Nov. 21, 22. *W. English Harrison*, for the defendants. The only duty of the defendants as surveyors of the highways was to keep up the surface of the road. An action cannot be maintained against surveyors of highways for a mere omission to repair, nor against a local board to whom the duties and liabilities of surveyor are transferred: *Gibson* v. *Mayor of Preston*. (2) Omission to repair is nonfeasance, and nonfeasance only is found in this case. In *White* v. *Hindley Local Board* (1), the defendants were held liable only as owners of the sewer-grid, which was out of repair and caused damage to the plaintiff. Here the valve was in proper order. The accident happened to the plaintiff from the wearing away of the road around the valve. That road was vested in the local board as surveyors of highways: 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 149, and the water

(1) Law Rep. 10 Q. B. 219. (2) Law Rep. 5 Q. B. 218.

1882

KENT v. WORTHING LOCAL BOARD.

authority would have no power to mend the road or do more to it than put in the valve. By s. 51 the defendants became the water authority, and s. 57 incorporates 10 Vict. c. 17 (The Waterworks Clauses Act, 1847), which by s. 28 authorises the opening and breaking up of the soil of the street to lay pipes and other works and engines, and do all other acts necessary for supplying water. Then if neither the local board as surveyor of highways, nor the local board as water authority is liable, the combination of authorities in the defendants does not extend their liability. In *Smith & Co.* v. *West Derby Local Board* (1) the defendants as the sewer authority were held liable for negligence in filling in their sewer, and that was enough for the decision of the case. In *Blackmore* v. *Vestry of Mile End Old Town* (2) there was also negligence in the water authority, the iron flap of their water meter in the road having become worn and slippery. Here there has been no negligence in the defendants as water authority. The duty unperformed was that of the surveyor of highways to lay road material on the road around the valve. The payments for repair of the road are all charged by the defendants to the road account and not to the water account. *Parsons* v. *St. Mathew, Bethnal Green* (3) is authority to shew that a statutory liability must be imposed in clear words.

J. Horne Payne, for the plaintiff. For nonfeasance in the performance of a duty transferred to them from the surveyor of highways the defendants are not liable. But they are liable for misfeasance; and for nonfeasance, if the duty unperformed was not within those transferred. Thus, in *Young* v. *Davis* (4), the surveyor was held not liable for non-repair of the highway, but Channell, B., distinguished the case from a case where the surveyor had done any act which of itself has caused injury, saying: "If personally, or by his servants, he had put a heap of stones in the road and left them there at night without being sufficiently protected, that would be an omission to do something to render harmless an act which he had affirmatively done." In the Public Health Act, 1875, the provisions of the Waterworks Clauses Act,

(1) 3 C. P. D. 423.
(2) 9 Q. B. D. 451.
(3) Law Rep. 3 C. P. 56.
(4) 7 H. & N. 760, p. 776.

MS. 286

1847, as to the breaking up of streets are incorporated only "with respect" (where the local authority have not the control of the streets) "to the breaking up of streets for the purpose of laying pipes." Here the local authority have the control of the streets, and therefore they do not need and are not given the power in the Waterworks Clauses Act. By s. 149 all streets being highways repairable by the inhabitants at large, are vested in and under the control of the urban authority. No doubt it has been held that such a provision does not increase the liability: *Gibson* v. *Mayor of Preston.* (1) The reason why the breaking up powers prescribed in the Waterworks Clauses Act, 1847, are not transferred is that the defendants as surveyors of highways have full power to deal with the streets, and they are bound to keep the valve which they have put there in a state which is not dangerous to the public. They have not done so, and that is misfeasance.

[FIELD, J., referred to *Hartnall* v. *Ryde Commissioners.* (2)]

There the defendants were held liable for an injury caused by a footway being out of repair, on the ground that a new obligation was imposed on them by statute. The cases are reviewed in *Borough of Bathurst* v. *Macpherson.* (3) In *Foreman* v. *Mayor of Canterbury* (4) the local board were held liable for injury caused by a heap of stones left negligently by the side of the road.

Cur. adv. vult.

Dec. 18. The judgment of the Court (Field, J., and Stephen, J.), was delivered by

STEPHEN, J. [The learned judge stated the case, and the view taken by the county court judge as above set out, and proceeded:] After argument and on full consideration of the case, we are unable to agree in the view taken by the learned county court judge, and we are of opinion that his decision must be reversed, and judgment entered for the plaintiff with 21*l.* damages and costs.

The following is the view which we take of the authorities on the subject. It was held in *Russell* v. *The Men of Devon* (5) that

(1) Law Rep. 5 Q. B. 218.
(2) 4 B. & S. 361.
(3) 4 App. Cas. 256.
(4) Law Rep. 6 Q. B. 211.
(5) 2 T. R. 667.

1882

KENT v. WORTHING LOCAL BOARD.

an action would not lie against the inhabitants of a county for an injury caused by the neglect of the inhabitants to repair a county bridge, the case proceeding mainly on the ground that the inhabitants of the county could not be regarded as a corporation in such a sense as to be liable to be sued for their acts and defaults. The case was thus understood in *McKinnon* v. *Penson* (1), which decided that an action would not lie against the surveyor of a county bridge for an injury done by its want of repair, although by 43 Geo. 3, c. 59, s. 4, the surveyor may in some cases be sued. It was held in this as in some later cases that in all such cases the question to be determined by a consideration of the language of the statutes is, whether the legislature intended or not to make a surveyor of highways liable to an action in cases in which according to the principle of *Russell* v. *The Men of Devon* (2) the inhabitants are liable only to an indictment.

This question was raised in a variety of subsequent cases under the provisions of several different statutes, one of which only need be mentioned here. This is *Gibson* v. *Mayor of Preston.* (3) In this case it was held that the provisions of the Public Health Act of 1848, which are substantially re-enacted by the Public Health Act of 1875, did not incorporate local boards of health in such a way as to give a right of action against them for injuries arising from the non-repair of highways. The judgment of Hannen, J., in this case reviews all the authorities on the subject, and the decision is undoubtedly binding on this Court.

We are, however, of opinion that the facts of this particular case do not bring it within the principle of *Gibson* v. *Mayor of Preston* (3), but do bring it within a different class of cases of which *White* v. *Hindley* (4) and *Borough of Bathurst* v. *Macpherson* (5) are the most important. These cases appear to us to establish the principle that the water authority is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance to the highway, and that if they happen to unite in themselves (as is the case with the Worthing Local Board) the double character of highway autho-

(1) 8 Ex. 319.
(2) 2 T. R. 667.
(3) Law Rep. 5 Q. B. 218.
(4) Law Rep. 10 Q. B. 219.
(5) 4 App. Cas. 256.

rities and water authorities their duty to do so is clearer than it would otherwise be. In *White* v. *Hindley* (1) the accident was caused by a defective grate which was used partly to stop up the hole which would otherwise have been left in the road, and partly in order to allow the surface water to pass into the sewer. In *Borough of Bathurst* v. *Macpherson* (2) the accident was caused by the defective state of a barrel drain, which was in such a state that the adjacent soil of the road washed into it and made a hole which occasioned the accident. In reference to this Sir Barnes Peacock says in delivering the opinion of the Court: "Their Lordships are of opinion that under these circumstances the duty was cast upon them" (the municipality of Bathurst) "of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger when it arose, either by filling up the hole or fencing it."

It seems to us that this principle applies to the present case. In this instance the local board as water authority fixed in the highway an iron pipe with a valve cover at the top, proper in itself, but certain in the ordinary course of things to become a dangerous nuisance as the road wore away unless proper precautions were taken, which precautions the local board were able to take. It was their duty to take such precautions independently of and apart from their duties as surveyors of highways. It is true that the danger was caused by the wearing down of the road, and not by the rising of the pipes, but it seems to me that the position of the local board was precisely the same as if for some purpose they had planted in the road something which would grow. In such a case it would be their duty to cut it down to a level with the surface of the road, and in this case it was, we think, their duty to take one or other of the precautions described in the evidence to produce practically the same result. In the words of the judgment in *Bathurst* v. *Macpherson* (2), the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which but for such artificial construc-

(1) Law Rep. 10 Q. B. 219. (2) 4 App. Cas. 256.

1882

KENT v. WORTHING LOCAL BOARD.

tion would not have existed. There must accordingly be judgment for the plaintiff for 21*l.* and costs.

Judgment for the plaintiff.

Solicitor for plaintiff: *Bury V. Hutchinson.*
Solicitor for defendants: *John Hands.*

J. R.

Dec. 21.

MILNES *v.* THE MAYOR, &c., OF HUDDERSFIELD.

Local Government Acts—Water—Supply of "Pure and Wholesome"—Contamination from Leaden Pipes—Deleterious Effect on Consumer—Waterworks Clauses Acts, 1847 (10 & 11 *Vict. c.* 17), *s.* 35—*Special Act* (32 & 33 *Vict. c. cx*).

The defendants were empowered by a special Act (32 & 33 Vict. c. cx.), incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for domestic use within the limits and from the sources described in their Act.

By s. 66 of the special Act the defendants were entitled to prescribe the material to be used for service pipes by persons supplied with water, and by bye-laws the defendants prescribed that the material might either be lead or cast-iron. Leaden service-pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants from their mains to the house at the expense of the landlord and the plaintiff.

The service-pipes when laid belonged to the consumer of the water supplied through them.

By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same."

Water which was pure and wholesome in the mains of the defendants was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—

Held, that he had no cause of action.

Affirmed on appeal W.N. (83) 1 / 79. C.A.

FURTHER CONSIDERATION, before Mathew, J.

Dec. 9. *A. Wills, Q.C.*, and *Cyril Dodd*, for the plaintiff.

Sir F. Herschell, S.G., Forbes, Q.C., Lockwood, and *R. V. Williams*, for the defendants.

1882

MILNES v. MAYOR OF HUDDERSFIELD.

The facts and arguments are stated in the judgment.

Cur. adv. vult.

Dec. 21. MATHEW, J. In this action, which was tried before me at the Leeds Summer Assizes, the plaintiff sought to recover damages for injuries which he had sustained from impure and unwholesome water alleged to have been supplied by the defendants. The material facts were not in dispute, and it was agreed that the jury should assess the damages, and that the question of the defendants' liability in the action should be reserved for further consideration. The jury gave a verdict for 2000*l.*

The plaintiff is a solicitor residing in Huddersfield, and the defendants, the Huddersfield Corporation, are empowered under the Huddersfield Waterworks Act of 1869 to supply water for domestic use within the limits and from the sources described in their Act. With the Act of 1869 the Waterworks Acts of 1847 and 1863, with certain excepted provisions, are incorporated. The plaintiff for some years had been supplied from one of the defendants' mains through a lead service-pipe which was about ninety feet in length, part of which had been laid down at the expense of the landlord of the plaintiff's house, and the rest at the plaintiff's expense. By s. 66 of their Act the defendants are entitled to prescribe the material to be used for service-pipes by persons supplied with water, and under the bye-laws of 1873, which were in force when the service-pipes to the plaintiff's house were laid, it would seem that the material might either be lead or cast-iron. It was not disputed that the service-pipes when laid belonged to the consumer and not to the defendants. The material invariably used by the defendants for service-pipes had been lead, and lead service-pipes had been laid down to the plaintiff's house by the defendants upon the application of the landlord and the plaintiff without objection on the part of either to the material selected. The plaintiff and the members of his family had used the water supplied by the defendants from 1875 down to 1881 without inconvenience of any kind. In July of that year the plaintiff was attacked with an illness, the cause of which was not at first suspected. He soon recovered, but between September 1881, and May 1882, he suffered from a series of attacks of

1882

MILNES v. MAYOR OF HUDDERSFIELD.

increasing severity, and was finally affected with grave symptoms which were clearly referable to lead poisoning. Upon analysis of the water drawn from the service-pipe to the plaintiff's house the presence of lead was detected, and it was not disputed at the trial that the plaintiff's condition was due to his use of the water which had become contaminated with lead absorbed from the service-pipe. It appeared that between 70,000 and 80,000 people were supplied from the reservoir from which the water for the plaintiff's house was drawn. It was not contended that there had been any want of care or skill on the part of the defendants or their agents, and it was admitted that the water while in the mains from which the plaintiff's supply was taken was pure and wholesome, and in its natural condition, as it was drawn from the sources specified in the Act of 1869. It was further admitted that the material used for the service-pipes was that which was best adapted for the purpose, and that it had been used with perfect safety for the supply of a great number of large towns. No clear explanation of the cause of the contamination of the water supplied to the plaintiff was given by the scientific witnesses called on either side. It was stated that soft water, like that supplied to Huddersfield, usually contained ingredients which served to form an insoluble coating to lead service-pipes, and prevented the absorption of lead. It was not explained why this protective process had not taken place in this particular case. There was evidence to shew that some persons were peculiarly susceptible of the poisonous property of lead, and that so small a quantity as one-fortieth of a grain of lead per gallon of water might be injurious. It was stated that the quantity of lead absorbed was not always the same, and varied, it was supposed, with changes of an obscure kind in the natural condition of the water. Scientific men of great eminence were called at the trial who appeared to be unable to explain how the water supplied to the plaintiff had become contaminated to the extent ascertained upon analysis; or how the plaintiff alone out of the large number of persons supplied from the same reservoir had suffered the serious injuries which he was proved to have sustained.

The case came on for argument on further consideration on the 9th instant. It was contended by counsel for the plaintiff that

under s. 35 of the Act of 1847 the defendants were bound to have in their mains for the supply of the plaintiff pure and wholesome water. It was treated as a fact clearly established at the trial that a lead service pipe was the best and safest mode of conveying water from the mains to the plaintiff's house, and it was argued that though the water may have been pure in the mains, it was nevertheless not fit for domestic use if, when drawn from the mains by the best known method, it became contaminated before it reached the plaintiff's house. It was urged that the defendants were under their Acts in the position of a company of traders carrying on the business of supplying water to customers, and that it was reasonable that the legislature should require them to warrant the quality of the article which they supplied. Their position was said to be analogous to that of a railway company empowered to make contracts with the public, and it was contended that in the statutory contract made with each customer the legislature must have intended that there should be implied the warranty, which would be contained in a mercantile contract of the same character, viz., that the water should be fit for the purpose for which it is supplied. As against this view attention was called by the counsel for the defendants to the terms of the 35th section of the General Act of 1847, which, so far as they are material, are as follows: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." It was pointed out that the private Act from which the defendants derived their powers enabled them to provide a supply of water from certain specified sources; and that while the mains by which the water was drawn from those different sources belonged to the defendants, the service pipes were the property of the consumers, and that it was reasonable to suppose that in accordance with the precise terms of s. 35 the responsibility for the condition of the water was intended to terminate at the defendants' mains. That as it was shewn that lead was the best material for service pipes it would be unreasonable that the defendants should be made responsible for what no

1882

MILNES v. MAYOR OF HUDDERSFIELD.

care or skill could have prevented, viz., contamination due to the natural action on the plaintiff's service pipe of pure and wholesome water, and that the supposed warranty would be imposing on the defendants an obligation which they would have no practicable means of fulfilling.

The contention of the defendants appears to me to be correct. There seems no reason for departing from the plain terms of s. 35, by which the defendants are required to keep in their pipes pure and wholesome water for domestic use, and no ground for supposing that any further duty was intended to be imposed upon them. The meaning of s. 35 is made clear from the terms of the sections in the same Act as to the pipes to be laid by consumers (ss. 48 to 53). By s. 48 the consumer might compel the defendants to supply him with water through a service pipe of material not selected or approved by the defendants. It could not have been meant that the defendants should be responsible for contamination due to the material of a pipe thus provided. Again, it would seem unreasonable that the defendants should be exposed to claims for what might be due to the carelessness of the consumer after the supply had come under his control and not to any impurity in the water in the defendants' mains. Further, by s. 61 of the Act of 1847, the defendants are entitled to recover penalties from persons by whom their water supply might be fouled, and this would seem to be the only remedy. If the plaintiffs' contention were right the defendants might be made responsible, without default on their part, for contamination due to the acts of others, against whom they would have no right to an indemnity. I do not consider it necessary to express an opinion upon a further point made by the defendants, viz., that under s. 36 of the Act of 1847 they were liable, if at all, to a penalty and not to an action. Nor do I consider it necessary to deal with the question whether, upon the assumption that the defendants could be treated as having entered into a contract with respect to the quality of the water, there was evidence of the breach of any warranty which it would be reasonable to imply. I regret that the serious injuries sustained by the plaintiff must remain without the redress which the verdict of the jury was intended to give him. I am compelled to decide that he has no

cause of action against the defendants, and my judgment must be entered for them with costs. 1882

MILNES v. MAYOR OF HUDDERSFIELD.

Judgment for the defendants with costs.

Solicitors for plaintiff: *Sykes & Son.*

Solicitors for defendants: *Van Sandau & Co.*

J. R.

BELL AND ANOTHER *v.* STOCKER. *Dec. 5.*

Husband and Wife—Liability of Husband after Wife's death for her Debts before Marriage—Married Women's Property Act (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *ss.* 1, 2.

A husband is not liable under the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), after his wife's death for her debts contracted before the marriage.

CLAIM stating that the plaintiffs sued the defendant as husband of S. M. Stocker, deceased, for goods sold and delivered to S. M. Stocker during the years 1878 and 1879, and before her marriage with the defendant.

Demurrer.

J. P. Murphy, Q.C. (*W. Graham*, with him), for the defendant. The defendant is not liable to be sued after the death of his wife for debts contracted by her before her marriage with him. It is only where he can be sued jointly with her that he is liable in respect of such debts. This was the law before the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93): *Heard* v. *Stamford.* (1) The Act 33 & 34 Vict. c. 93, s. 12, abolished the liability of the husband for the debts of his wife contracted before marriage. The Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50) repealed this exemption, and (s. 1) enacted that a husband and wife married after the passing of the Act may be "jointly" sued for any such debt. This enactment must be taken, so far as procedure is concerned, to restore the law prior to the Act of 1870.

T. W. Chitty, for the plaintiffs. The Act 37 & 38 Vict. c. 93, s. 1, by repealing the enactment that a husband shall not be liable for the debts of his wife contracted before marriage, has

(1) 3 P. Wms. 409.

1882

BELL v. STOCKER.

created a fresh liability on the part of the husband which is not determined by the death of the wife. It is true that s. 1 enacts that a husband and wife married after the passing of the Act may be jointly sued for any such debt. But this must mean jointly sued while the wife is alive; and s. 4 by using the words "when a husband and wife are sued jointly," goes to shew that it is not essential to the liability of the husband that he should be sued jointly with his wife, but that the extent of his liability is measured by the amount of the property of his wife which has vested in him. This conclusion is certainly the more equitable one.

FIELD, J. This demurrer must be allowed. Before the Married Women's Property Act, 1870, a husband was liable for his wife's debts which she had contracted before the marriage, whether she had or had not property at the time of her marriage. But he was not liable after her death, and if he could not be sued jointly with her in respect of these debts he was not liable at all. As far back as *Heard* v. *Stamford* (1), an attempt was made in Equity to make a surviving husband liable to his wife's liabilities by reason of his having acquired her property by the marriage. This attempt failed. The Married Women's Property Act, 1870, abolished the liability of the husband for his wife's debts contracted before his marriage; but the Married Women's Property Act, 1874, again altered the law, making the husband liable to the amount of property of his wife which had vested in him, and providing that husband and wife might be jointly sued for any such debt. And s. 2 proceeds to enact that "in such action," which clearly means a joint action, the husband shall be liable to the extent of assets received from his wife. So that it is essential to the husband's liability that he should be sued jointly with his wife, and there is no foundation for the argument that he can be liable in a separate action after her death.

Judgment for the defendant.

Solicitors for plaintiffs: *Torr, Janeways, Gribble, & Oddie, for Wells & Hind, Nottingham.*

Solicitor for defendant: *Adrian Young, for Bartlett, Loughborough.*

(1) 3 P. Wms. 409.

A. P. S.

HARBOTTLE, Appellant; TERRY, Respondent.

1882
Dec. 6.

Salmon Fisheries—Salmon Fishery Act, 1865 (28 & 29 *Vict. c.* 121), *s.* 3—*Fishery Districts—Definition of Limits by Secretary of State's Certificate—River—"Tributary," what is—Reservoirs.*

By 28 & 29 Vict. c. 121 the limits of a river shall be defined, and a fishery district shall be formed, for the purposes of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river and district, and by s. 3, "river" shall include "such portion of any stream with its tributaries" as may be declared in the certificate. Prior to 1845 the Whittle Burn in the county of Northumberland was a tributary of the Tyne. In 1845 a water company, under powers given by local Acts, constructed works for the supply of water to a neighbouring town, by placing a dam across the stream of the Whittle Burn, and forming a series of reservoirs; the water being taken by underground pipes from the stream into the highest reservoir, and from thence to the others. All water not required for the reservoirs was allowed to pass down a watercourse running outside the reservoirs into the ancient watercourse of the burn, down which it flowed into the Tyne. Sometimes all the water coming down the Whittle Burn was taken into, and impounded in, the reservoirs, and none flowed into the Tyne. At other times all the water flowed into the Tyne without having entered the reservoirs. There were outlets with sluices from the reservoirs by which surplus water flowed into the Tyne down watercourses also running into the ancient watercourse of the burn. In 1866, the Fishery District of the River Tyne was formed and the Secretary of State's certificate defind the limits as "so much of the river Tyne with its tributaries" as was situate (inter alia) in the county of Northumberland:—

Held, that the reservoirs were not tributaries of the Tyne within the meaning of the certificate.

Case stated by justices under 20 & 21 Vict. c. 43.

The appellant preferred an information against the respondent before certain justices of Northumberland for having, within the fishery district of the River Tyne (in which district licenses are payable under the provisions of the Salmon Fishery Acts, 1865 to 1873, and the Freshwater Fisheries Act, 1878), unlawfully attempted to take trout by means other than a properly licensed instrument for catching trout, contrary to the provisions of s. 22 of the Salmon Fisheries Act, 1873 (36 & 37 Vict. c. 71). (1)

(1) By s. 22 of 36 & 37 Vict. c. 71, any person fishing for or attempting to take or kill, in all fishery districts in which licenses are payable under the Salmon Fishery Act, 1865, salmon by any means whatsoever other than properly licensed instruments, shall be liable to a penalty. By 38 & 39 Vict.

1882

HARBOTTLE v. TERRY.

From the statements in the case, and a consideration of the plan, which was made part of it, the material facts appeared to be as follows:—

Previous to 1845 a stream called the "Whittle Burn" was a tributary of the river Tyne, the stream running approximately from north to south.

By various local Acts, passed in 1845 and subsequently, the Newcastle and Gateshead Waterworks Company were empowered to construct works for the purpose of supplying water to the inhabitants of Newcastle-on-Tyne.

The company accordingly, in pursuance of the powers given by their Acts, formed a series of reservoirs by placing dams across the Whittle Burn, and erecting walls and other works. The lowest or most southern of these reservoirs is called the Great Southern Reservoir. Water is taken into the highest or most northern reservoir from the Whittle Burn by means of pipes placed underground. The reservoirs are connected by similar underground pipes, through which the water flows from one to another, and finally into the Great Southern Reservoir.

All the water coming down the "Whittle Burn," which is not taken into the reservoirs, flows down a watercourse running outside the western side of the whole chain of reservoirs, and into the ancient watercourse of the Whittle Burn at a point south of the Great Southern Reservoir.

The Great Southern Reservoir is provided with an outlet, with sluices, on its eastern side, by which the water can be let off into a watercourse running down the eastern side of the reservoir, into the ancient watercourse of the Whittle Burn at a point south of the Great Southern Reservoir. The other reservoirs are provided with similar outlets into the watercourse on the western

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c. 39, which by s. 2 is to be read as one with the Salmon Fishery Acts, 1861 to 1876, the provisions of the Salmon Fishery Acts, 1865 and 1873 with respect to the formation of fishery districts, and to the appointment and powers of conservators, shall extend to all waters "frequented by trout or char."

By s. 7. In any fishery district the board of conservators are empowered to issue licenses to all persons fishing for trout or char, and the provisions of s. 22 of 36 & 37 Vict. c. 71, shall be construed as if the words "trout or char," were inserted throughout after the word "salmon."

side of the chain of reservoirs. The Whittle Burn both above and below the chain of reservoirs is a tributary of the Tyne.

Sometimes all the water of the Whittle Burn flows directly to the river Tyne without entering the reservoirs; at other times a portion of the same water flows into the reservoirs, and thence through the outlets down the Whittle Burn, and into the Tyne.

At other times all the water coming down the Whittle Burn is impounded in the reservoirs, and none of it flows into the Tyne. It is of frequent occurrence in summer for no water to come down the burn, and for no waste water to pass out of the reservoirs; and when the reservoirs are full all the surplus water is sent into the Tyne.

Part of the water-supply to the reservoirs is taken from another stream called the Whittle Dean Burn, in a mode similar to that before described with respect to the water of the Whittle Burn. Water coming down the Whittle Dean Burn, which is not required for the reservoirs, passes down the watercourse running along the east side of the chain of reservoirs, and into the Whittle Burn at a point south of the Great Southern Reservoir.

Salmon, the young of salmon, and trout can pass from the Tyne into the Whittle Burn, and thence into the reservoirs, but the stream must be in flood, and the sluices drawn up. Trout have been caught in the stream, and trout, bull-trout, and the young of salmon have been caught in the Great Southern Reservoir. By a certificate of the Secretary of State issued in May, 1866, the "Fishery District of the River Tyne" was formed, and the limits of the district were described to be "so much of the river Tyne and its tributaries as is situate within the counties of Cumberland, Northumberland," &c. A Board of Conservators for the district was duly appointed, and a scale of licenses was duly approved by the Secretary of State under the Salmon Fishery Act, 1865. (1)

(1) By s. 3 of 28 & 29 Vict. c. 121, "river shall include such portion of any stream with its tributaries . . . as may from time to time be declared in manner hereinafter provided."

By s. 5, the limits of a river shall be defined, and a fishery district formed, by a certificate under the hand of one of her Majesty's principal Secretaries of State, describing the limits of the river or district.

1882

HARBOTTLE v. TERRY.

On the 29th of May, 1882, the respondent fished for trout in the Great Southern Reservoir with a stick and two lines, being an instrument not properly licensed by the board of conservators of the district.

The justices decided that the reservoirs were not tributaries of the Tyne, and therefore not within the jurisdiction of the Board of Conservators for the Tyne fishery district. The question for the opinion of the Court was whether the Great Southern Reservoir was a tributary of the river Tyne within the meaning of the Secretary of State's certificate.

If the Court should be of opinion that the Great Southern Reservoir was such a tributary then the justices' order dismissing the information was to stand. If the Court should be of the contrary opinion, then the case was to be remitted to the justices to be dealt with according to the decision of the Court.

Willis Bund, for the appellant. Upon the facts stated in the case the justices ought to have decided that the Great Southern Reservoir was a tributary of the Tyne. In *Hall* v. *Reid* (1)

(1) The case of *Hall*, appellant, *Reid*, respondent, was heard in the Queen's Bench Division on the 12th of June, 1882, and came before the Court on a case stated by certain justices of Derbyshire, containing the following material facts:—

The appellant, a water-bailiff to the Board of Conservators of the Trent Fishery District, duly constituted under the provisions of the Salmon Fishery Acts by a certificate of the Secretary of State, preferred an information against the respondent for having unlawfully attempted to take trout by means of an instrument not properly licensed by the board. The Secretary of State's certificate defined the limits of the fishery district of the river Trent as (inter alia) "so much of the river Trent and its tributaries" as lay within certain counties, including the county of Derby. The respondent committed the alleged offence by fishing with a rod and line, without a license, in the river Wye in Derbyshire.

The river Wye flows into the Derwent, which flows into the Trent.

The justices dismissed the information, subject to the case stated, being of opinion that the word "tributaries" in the certificate meant direct tributaries, and did not include the tributary of a tributary, and that the case of *Merricks* v. *Cadwallader* (51 L. J. (M.C.) 20) was in point and bound them. The question for the opinion of the Court was whether or not the respondent required a license from the board of conservators to fish in the Wye.

Willis Bund, for the appellant.
Woolf, for the respondent.

FIELD, J. I see no necessity for putting the limitation suggested upon the word "tributary." Why should

Field, J., defines a tributary as "that which contributes to." Here the Great Southern Reservoir contributes water to the river Tyne.

[FIELD, J.:—Is not that definition too broad? Here the water is impounded in the reservoir for a commercial purpose. The question is whether, whilst in that position, it is a tributary. If it is, water taken from a reservoir, used for public purposes, and returned to the stream through the drains of a town would seem to be within the definition; and a license would be necessary to fish in a private artificial pond in a park, where the pond was supplied by water taken from a stream and afterwards returned to it.]

The question is one for the discretion of the Secretary of State in forming the district: *Reg.* v. *Grey.* (1) If the water company thought that hardship would result from applying the provisions of the Salmon Fishery Acts to their reservoirs, they should have applied to the Secretary of State to except the reservoirs from his certificate. The fact that upon occasions all the water in the reservoirs is appropriated for the purposes of the company and none returned to the stream, does not affect the question whether the reservoirs are tributaries. A mountain stream, the bed of which becomes dry for months in summer, may still be a tributary. The Great Southern Reservoir is a tributary of the Whittle Burn, which is found in the case to be a tributary of the Tyne. The reservoir, therefore, is a tributary of the Tyne within the decision

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not the Court read the word in the Secretary of State's certificate in its natural sense? A "tributary" is that which contributes to. No one can doubt for a moment that the Wye is a tributary of the Trent in that sense. If it were not that the waters of the Derwent were brought in aid, the Wye would be the sole tributary of the Trent; it would be the Trent, and the difficulty would be got over in that way. The justices appear to have thought that *Merricks* v. *Cadwallader* decided the point, but that is not so. The judgment turned upon the construction of the certificate in that particular case, and the Court applied a well-known rule of construction, holding that the certificate having specified the rivers Vyrynw and Teme, which were direct tributaries of the Severn, the words "and of all other tributaries of the river Severn," &c., were confined to tributaries of the same kind as the Vyrynw and Teme, i.e., direct tributaries.

CAVE, J. I am of the same opinion.

Case remitted.

(1) Law Rep. 1 Q. B. Judgment of Blackburn, J., pages 472, 473.

1882

HARBOTTLE v. TERRY.

in *Hall* v. *Reid*. (1) The mischief which the Salmon Fishery Acts strike at is as great in the case of these reservoirs as in the case of streams.

J. Edge, for the respondent, was not heard.

FIELD, J. The question raised by the case is not free from difficulty, but on the whole I am unable to say that the justices arrived at a wrong conclusion. We have to decide a pure question of the construction of the statute, and in order to find out its meaning we may look at the object the legislature had in view, and the consequences which would follow the application in particular instances of the powers given by the statute. The object of the Act, as stated in the preamble, is to prevent the destruction of migratory fish. It is intended to protect a large source of food supply for the good of the community, and to ensure that fish which come from and return to the sea should be preserved in certain ways from destruction, and to carry out this intention very large powers were given to the conservators and water-bailiffs. [The learned judge stated the facts.] The question is whether upon these facts the Great Southern Reservoir is a tributary of the Tyne. I agree that the mere circumstance that the stream, as the case finds, is at one time of the year full and at another empty does not prevent it being a stream which may be a tributary of the Tyne. But, without attempting to lay down an exhaustive definition of "tributary," I am of opinion that it must be something in the nature of a stream. For an instance I should have very great difficulty in saying that an artesian well was a tributary of the stream from which the water came, and to which it returned. If reservoirs such as the one in question are held to be "tributaries" within the Act it is difficult to see where the definition is to stop. It is impossible to say that the legislature meant to include in the word "tributaries" all water which has once been in a stream and finds its way back again. My language in *Hall* v. *Reid* (1) may perhaps have been too wide, but it was applied to the facts of that particular case which altogether differed from, and does not govern, this case. The language I used therefore has no application here. The object of the legislature being to

(1) See Note 1, ante p. 134.

protect migratory fish, it is to be observed that such fish could only get into the reservoir when the water was in flood and the sluice open. The water is impounded in the reservoir as a commercial article to be used for the purpose of supplying domestic and artificial wants. The flow of water is not intermittent in the sense in which the flow of the mountain stream is intermittent, but it is intermittent in the sense that the water company can, if they wish, take it all for the purposes of their undertaking. For these reasons I cannot say that the decision of the justices was wrong, and I am of opinion that their order should stand.

STEPHEN, J. I am of opinion that the water in the Great Southern Reservoir did not form a tributary of the Tyne within the statute. I think a person speaking in ordinary language would not say that a pond, formed by obtaining a flow of water from a stream—the water being afterwards returned to the stream—was a tributary of the stream. In ordinary language a "tributary" is a stream running into another stream. The word has no technical meaning, and its popular meaning is not very indefinite, though I should be very sorry to attempt a complete definition. The question what is or is not a tributary must depend upon the particular distinguishing circumstances of each case. For instance, where a stream running down a valley was dammed up at various points so as to form a series of pools by swelling out the current of the stream, which pursued its ordinary course after passing through the pools, I should say that the pools would be tributaries of the stream; or where a stream widens into lakes at no great distance from the sea, with a strong direct stream running through them and out into the sea, it may be that the lakes would be tributaries. But the reservoirs in the present case are of a different nature. The streams here, which are undoubtedly tributaries of the Tyne, run round the reservoirs on each side, and the water is conveyed by means of underground pipes to the reservoirs, and thence back to the streams. I think this case more resembles that of a private pond formed in grounds for the purpose of ornament. It would, in my view, be a strained use of language to call the Serpentine, or the Round Pond in Kensington Gardens, tributaries of the Thames, and I can see very little

1882

HARBOTTLE v. TERRY.

difference in principle between those cases and this. I am of opinion that the justices' decision was right.

Order of justices affirmed.

Solicitors for appellant: *Flux & Leadbitter, for Gibson, Hexham.*

Solicitors for respondent: *Pattison, Wigg & Co., for G. Armstrong, Newcastle.*

W. A.

Dec. 8.

THE BISHOP AUCKLAND LOCAL BOARD, APPELLANTS; THE BISHOP AUCKLAND IRON AND STEEL COMPANY, LIMITED, RESPONDENTS.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 91, *sub-s.* 4—*Nuisances—Accumulation or deposit a "Nuisance or injurious to Health"—Absence of Injury to Health.*

By s. 91 of the Public Health Act, 1875, "any accumulation or deposit which is a nuisance or injurious to health" shall be deemed to be a nuisance liable to be dealt with summarily under the Act:—

Held, that an offence within the section was committed where the accumulation emitted offensive smells which interfered with the personal comfort of persons living in the neighbourhood, but did not cause injury to health.

Great Western Ry. Co. v. *Bishop* (Law Rep. 7 Q. B. 550) distinguished.

CASE stated by justices under 20 & 21 Vict. c. 43.

On the 10th of July, 1882, the appellants, who were the Bishop Auckland Local Board, preferred a complaint against the respondents before certain justices of the county of Durham, under s. 91, sub-s. 4 of the Public Health Act, 1875, for maintaining a nuisance upon their premises, namely, "an accumulation or deposit of cinders, ashes and refuse, which was a nuisance or injurious to health, and was caused by the act and default of the respondents."

Upon the hearing of the complaint the following facts were either proved or admitted by the parties:

The respondents are the occupiers of certain premises within the appellants' district, in which the manufacture of iron and steel is carried on. The works are in the town of Bishop Auckland, and are surrounded by dwelling-houses on three sides.

In the course of carrying on their business the respondents produce large quantities of cinders and ashes, which are not

removed from the premises, but are deposited there and allowed to accumulate.

The heaps so accumulated are on fire and continually smouldering, and from them are thrown off strong fumes or effluvia.

The appellants called their surveyor, who stated that he had had complaints of the nuisance caused by the effluvia. He also stated that a portion of the burning heaps stands upon certain sewers belonging to the appellants, and the fumes from such heaps found their way into and along the sewers through the water-closets into the dwellings of certain of the inhabitants of the appellants' district.

The appellants also called their medical officer, who stated that, although he had no doubt of the effluvia complained of being a nuisance to some people, he had never known the health of any of the inhabitants to suffer therefrom, and further that it was not a nuisance injurious to health.

It was contended for the respondents that, as the medical evidence had failed to prove injury to health, the prosecution must fail, and *Great Western Ry. Co.* v. *Bishop* (1) was cited in support of such contention.

For the appellants it was contended that it was not necessary to prove that the nuisance complained of was injurious to health, and that, if the justices were satisfied there was a nuisance caused by the effluvia, they ought to convict the respondents. *Malton Board of Health* v. *Malton Manure Co.* (2) was cited in support of this view.

The justices found as a fact that, although the effluvia from the smouldering ashes might be a nuisance, they were not injurious to health, and dismissed the complaint.

The question for the opinion of the Court was whether it was necessary for the appellants to prove, not only that a nuisance was caused by the effluvia in question, but also that such nuisance was injurious to the health of the inhabitants of the district.

W. A. Meek, for the appellants. The justices ought to have convicted. *Great Western Ry. Co.* v. *Bishop* (1), which may be relied on for the respondents, does not conclude this case. The

(1) Law Rep. 7 Q. B. 550. (2) 4 Ex. D. 302.

1882

BISHOP AUCKLAND LOCAL BOARD v. BISHOP AUCKLAND IRON CO.

decision was upon s. 8 of the Nuisances Removal Act, 1855, and the Court held that the Act, being a sanitary Act, applied only to nuisances injurious to health. It is submitted that in the present case the view taken by Stephen, J., in *Malton Board of Health* v. *Malton Manure Co.* (1) should be followed.

Henn Collins, for the respondents. *Great Western Ry. Co.* v. *Bishop* (2) is directly in point, the decision being upon the very same words as are found in s. 91, sub-s. 4 of the Public Health Act, 1875. In *Malton Board of Health* v. *Malton Manure Co.* (1) the decision rested upon the fact that there was injury to health, because sick persons were made worse by the offensive effluvia. The dicta of Stephen, J., which are relied on, were not necessary for the decision of the case, and it may be distinguished from the present because the decision was upon the words "nuisance or injurious to health" occurring in a group of sections relating to the carrying on of offensive trades.

[He also called the attention of the Court to *Banbury Sanitary Authority* v. *Page*. (3)]

STEPHEN, J. I think the judgment of the justices ought to be reversed. I stand by my judgment in *Malton Board of Health* v. *Malton Manure Co.* (1), and I do not think that case was decided on the precise point which arose in *Great Western Ry. Co.* v. *Bishop*. (2) Both the Acts upon which these cases were decided contain a definition of nuisance. By the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), the word "nuisances" shall include any premises in such a state as to be a "nuisance or injurious to health." Now in the case of *Great Western Ry. Co.* v. *Bishop* (2), the particular nuisance complained of was not only not injurious to health, but it was not a nuisance that in any kind of way related to the health, or even to the permanent comfort, of any of the neighbours. It was a mere common law nuisance like the non-repair of a highway. The appellants allowed rain-water to drip from one of their bridges on to the highway, and the Court held that that was not the sort of thing the legislature meant by using the words "nuisance or injurious

(1) 4 Ex. D. 302. (2) Law Rep. 7 Q. B. 550.
(3) 8 Q. B. D. 97.

to health" in 18 & 19 Vict. c. 121. I think that case does not throw any light upon what the decision of the Court would have been if the nuisance, though not absolutely injurious to health, was one which would interfere with the permanent comfort of those in the neighbourdood, and might probably become injurious to health. I see a great distinction between water dripping from a bridge, and a heap of ashes and refuse producing noisome effluvia as in the present case. The Court in *Great Western Ry. Co.* v. *Bishop* (1) abstained from bringing within the purview of the Nuisances Removal Act, 1855, a nuisance of an entirely different kind from the nuisances the legislature intended to deal with. In *Malton Board of Health* v. *Malton Manure Co.* (2) the nuisance was injurious to health, because it was found that the effluvia caused sick persons to become worse, but I said in effect in my judgment that, even if the nuisance were not shewn to be precisely injurious to health, yet, if shewn to be injurious to personal comfort, and possibly injurious to health, it would be exactly one of the nuisances to which both the old and the new Acts would apply. I am of the same opinion as I then was that the words "nuisance or injurious to health" do not mean "nuisance injurious to health." That is obviously not their natural meaning, and I object, unless compelled, to give words a meaning which is different from their obvious natural one. Nor do I think that *Great Western Ry. Co.* v. *Bishop* (1) necessarily does this. The natural sense of the words seems to me the best one to apply in the present case, i.e., a nuisance either interfering with personal comfort or injurious to health. Of course there may be an injury to health which is not a nuisance interfering with personal comfort; for instance, a man may catch typhoid fever or diphtheria without being exposed to a nuisance. On the other hand, many persons at one time believed that tanners' yards and other places where strong disagreeable smells prevailed, were beneficial to health in some cases. I think the legislature intended to strike at those sort of cases, i.e., at anything which would diminish the comfort of life though not injurious to health, and at anything which would in fact injure health. *Banbury Sanitary Authority* v. *Page* (3) illustrates my

(1) Law Rep. 7 Q. B. 550. (2) 4 Ex. D. 302.
(3) 8 Q. B. D. 97.

1882

BISHOP AUCKLAND LOCAL BOARD v. BISHOP AUCKLAND IRON CO.

view of the Act. There the Court held that keeping swine so as to produce offensive effluvia, though there was no injury to health, was a nuisance within s. 47 of the Public Health Act, 1875.

FIELD, J. I at first thought myself bound by *Great Western Ry. Co.* v. *Bishop* (1), but I find that the Court in the subsequent case of *Banbury Sanitary Authority* v. *Page* (2) took the view just expressed by my Brother Stephen. I am therefore able entirely to agree with his judgment.

Case remitted.

Solicitors for appellants: *Harvey, Oliver, & Capron, for J. T. Proud, Bishop Auckland.*

Solicitors for respondents: *Van Sandau & Cummings, for Belk & Parrington, Middlesbrough.*

W. A.

Dec. 20.

[IN THE COURT OF APPEAL.]

MILLEN *v.* BRASCH & Co.

Carrier—Negligence—Carriers' Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 1—*Temporary Loss of Goods—Damages.*

A carrier is not deprived of the protection afforded by the Carriers' Act (11 Geo. 4, & 1 Wm. 4, c. 68), s. 1, merely by the fact that the loss of the goods is temporary and not permanent, nor can the owner of goods, which ought to have been but were not declared pursuant to that statute, recover damages for the consequences of the loss of them, as distinguished from the loss itself.

The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence the trunk was put on board a vessel bound for New York, where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers' Act, the value of which exceeded 10*l.* The plaintiff was obliged to replace at enhanced prices the articles within the Carriers' Act contained in the trunk:—

Held, that the plaintiff could not recover from the defendants damages either for the temporary loss of the articles within the Carriers' Act or for being obliged to replace them at enhanced prices, a carrier being protected by the statute not only as to a loss but also as to all consequences flowing from it.

APPEAL by the defendants from the judgment of Lopes, J., after the trial. (3)

(1) Law Rep. 7 Q. B. 550. (2) 8 Q. B. D. 97.
(3) 8 Q. B. D. 35.

The facts of the case are sufficiently stated in the judgment of the Court hereafter set forth.

Nov. 27. *C. Russell, Q.C.*, and *F. P. Tomlinson*, for the defendants. It is unnecessary for the defendants to contend that the damages awarded by Lopes, J., are too remote, for they are not otherwise recoverable. *Hearn* v. *London and South Western Ry. Co.* (1) may appear to be against the defendants, but it is not a decision in point for the present case, because it is consistent with the pleadings in that case that the plaintiff's property during the time of its alleged loss was really in the defendants' possession. In the present case the alleged cause of action is that the plaintiff's trunk was by the carelessness of the defendants' servants sent to the United States instead of to Italy; but a carrier is not deprived of the protection afforded by the Carriers' Act by the fact that the loss of or injury to the goods intrusted to him happens through their being taken by him to a wrong destination: *Morritt* v. *North Eastern Ry. Co.* (2) The plaintiff's trunk was lost when it was taken to the Victoria Docks; it was, therefore, lost on land, and the defendants are protected by the Carriers' Act from every kind of liability.

Edward Pollock, for the plaintiff. This case falls within the principles laid down in the judgment in *Hearn* v. *London and South Western Ry. Co.* (1); it is a binding authority even in this Court, for it explains the true construction of the Carriers' Act. A chattel, which is missing for a time, and is afterwards, but before action, found, cannot be said to be lost within the meaning of the Carriers' Act; although possibly a different rule may apply where the chattel comes to light after an action has been commenced. It is unnecessary to argue on behalf of the plaintiff, that in order to fall within the protection of the Carriers' Act the "loss" must be a total and permanent deprivation of the goods; for in the present case the missing goods have been restored to the plaintiff before action brought. The plaintiff can recover damages for the detention of the trunk, even if he cannot recover the value of the goods which ought to have been declared.

(1) 10 Ex. 793. (2) 1 Q. B. D. 302.

1882

MILLEN v. BRASCH.

Moreover, the Carriers' Act applies only to contracts of carriage by land; but the "loss" happened through the plaintiff's goods being sent across the sea to New York.

[BRETT, L.J. The goods were on land when they were first mis-sent; moreover, if the plaintiff is dissatisfied with the amount of the judgment, he ought to have given a notice by way of cross-appeal.]

F. P. Tomlinson replied.

Cur. adv. vult.

Dec. 20. The judgment of the Court (Baggallay, Brett, and Lindley, L.JJ.), was delivered by

LINDLEY, L.J. The facts in this case, which was tried before Lopes, J., without a jury, are shortly as follows:—

The defendants are carriers for hire from London to Rome. On the 13th of November the plaintiff's agent delivered to the defendants a trunk to be sent by rail from London to Liverpool and there shipped in one of Bibbey's steamers for Italy. The defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger of New York. By the carelessness of the defendants' servants the trunk belonging to the plaintiff was taken to the Victoria Docks and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until about the 15th of December, 1879. On the 15th of December the defendants wrote to Hamburger, and on the 19th of December the trunk arrived in New York. On the 27th of February, the plaintiff claimed 210*l.* for the loss of the trunk and injury to its contents. On the 11th of March the trunk arrived at the defendants' offices, and at the plaintiff's request was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and the loss for the time was admitted. It was also admitted that some of the contents of the trunk were injured in New York owing to the Custom House officers unpacking the trunk and negligently and unskilfully repacking it. It was also admitted that the silk dresses and sealskin jacket are articles within the Carriers' Act, that their value exceeded 10*l.*, and that no declaration was made.

Lopes, J., held, first that the goods were lost within the true

meaning of the Carriers' Act, although their loss was only temporary; secondly, that the defendants were liable to pay damages for the loss and detention of those articles of apparel which there was no necessity to declare; thirdly, that the defendants were not liable to pay damages for the loss of or injury to the silks and furs, which ought to have been declared and were not declared; but fourthly, that the defendants were nevertheless liable to pay damages for the detention of those articles. The learned judge accordingly gave judgment for the plaintiff for 5*l.* beyond the sum of 5*l.* paid into court, with costs. The 5*l.* paid into court was sufficient to cover the damages to which the plaintiff was entitled in respect of the loss and detention of those articles, which there was no necessity to declare; and substantially the question raised by the appeal to this Court is as to the liability of the defendants to pay damages for the loss or detention of the silks and furs which were not declared.

In holding that the defendants were liable to damages for the detention, although not for the loss of these articles, the learned judge followed what he understood to be the law as laid down in *Hearn* v. *London and South Western Ry. Co.* (1) That case, at first sight, appears in favour of the plaintiff. But if the pleadings demurred to are carefully examined, it will be found that the plaintiff, in his new assignment, carefully negatived the loss of the goods for the detention of which he was suing, and the point really decided was that where goods, which ought to be declared, and are not declared, are detained by a carrier without being lost by him he is liable for such detention. This is consistent with the language of the Carriers' Act, which exonerates carriers from liability for loss of or injury to certain kinds of goods if not declared, but does not exonerate carriers from their liability for the undue detention of such goods. In this case, however, the learned judge found as a fact that the goods were lost within the meaning of the Carriers' Act, although the loss was only temporary; and assuming this finding to be correct it appears to us impossible to hold the carriers irresponsible for the loss, but responsible for detention caused by the loss. There is nothing in the Carriers' Act to warrant such refinement; nor does the

(1) 10 Ex. 793.

1882

MILLEN v. BRASCH.

decision in *Hearn* v. *London and South Western Ry. Co.* (1), as has already been shewn.

Let us consider the question apart from authority, and let us take first the case of goods permanently lost. The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers' Act protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable. So in the case of a temporary loss by the carrier; to hold him not liable for the loss but liable for the consequences of it is practically inconsistent, and so to construe the Carriers' Act would in effect be to render it inoperative. It is to be observed that the Carriers' Act protects the carrier from "liability for the loss of or injury to" undeclared goods; the Act does not simply relieve him from paying the value of undeclared goods which he loses; he is relieved from liability for their loss, and it would be to fritter away the Act and to depart from sound principles of construction to hold that "loss" in the Act only means "value" as distinguished from "loss" and its consequences.

If we turn to authority we shall find that this view of the Act is supported by two decisions, one in this country and one in Ireland, viz., *Piancini* v. *London and South Western Ry. Co.* (2) and *Wallace* v. *Dublin and Belfast Ry. Co.* (3) Both of these cases were decided on demurrer. The first shews that where goods are lost and the owner cannot recover the loss he cannot recover for non-delivery which is occasioned by the loss, and further, that where goods are detained but not lost the carrier is not protected. The case of *Wallace* v. *Dublin and Belfast Ry. Co.* (3) appears to have been very like the case now before us, for the goods were there alleged to have been lost by the carriers, although only for a time, and the Court held that the Carriers' Act applied and protected carriers from liability as well for the temporary as for the permanent loss of undeclared articles, and

(1) 10 Ex. 793. (2) 18 C. B. 226.
(3) Ir. R. 8 C. L. 341.

also from liability for the consequences of such loss. This appears to us to be the proper construction of the statute.

The result comes to this; if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers' Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner: see *Hearn* v. *South Western Ry. Co.* (1); and this again must depend on the facts of each particular case. If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them he will not be liable; but if he keeps them after he has recovered them, the Carriers' Act will not protect him from such subsequent breach of duty. The obligation on the part of the carrier to deliver the goods will remain or revive and he will be responsible for future breaches of that obligation. It is therefore a mistake to suppose that it will be against the carrier's interest to try and find undeclared goods temporarily lost. The utmost that can be said on that subject is that he will gain nothing by finding them. On the other hand, to hold him liable for their detention when temporarily lost, but not when permanently lost, would be to make it beneficial to him not to find them. If that were the law it would be to his interest to convert all temporary losses into permanent losses. This anomaly would, no doubt, be obviated by holding the carrier also liable for the detention of goods permanently lost, but in our opinion this cannot be done.

As already stated, the learned judge held, that in this particular case, the goods were temporarily lost by the carrier, within the true meaning of the Carriers' Act. The defendants naturally supported that view of the facts; but the plaintiff contested the conclusion arrived at on this point, and we have therefore considered it; and we agree with the learned judge in thinking that the trunk was lost. As we understand the facts, the plaintiff's trunk was shipped and sent to New York as Hamburger's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered; and the

(1) 10 Ex. 793.

1882

MILLEN v. BRASCH.

carriers had lost possession of the trunk, and did not in fact know where it was nor what had become of it. This was, in our opinion, a loss of the trunk by the carriers; for although they had the bill of lading, the trunk was not referred to in it. For the reasons above given, we are of opinion that the trunk being lost the defendants were not liable for any damages in respect of the loss or detention of or injury to the silks and furs contained in the trunk; and that the defendants, having paid into court enough to cover their liability for the other articles, are entitled to judgment in the action with costs and to the costs of the appeal.

Judgment reversed.

Solicitors for plaintiff: *Wilson, Bristows, & Carpmael.*
Solicitors for defendants: *Lumley & Lumley.*

J. E. H.

Dec. 21.

[IN THE COURT OF APPEAL.]

HUMPHREYS *v.* GREEN AND ANOTHER.

Contract—Interest in Land—Verbal Promise to devise such Interest by Will—Part Performance—Statute of Frauds, s. 4.

The general principle as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds is accurately stated in the judgment in *Alderson* v. *Maddison* (7 Q. B. D. at p. 178):—

Held, also, by Baggallay, L.J., that the illustration which is there given of such general principle that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute" is rightly qualified by the following words which are there stated, "unless it is shewn that the payment was made in respect of the particular land, and the particular interest in the land, which is the subject of the parol agreement," those qualifying words being used to cover such a case as *Nunn* v. *Fabian* (Law Rep. 1 Ch. 35).

Semble, per Brett, L.J., that *Nunn* v. *Fabian* (Law Rep. 1 Ch. 35) is not an authority for those qualifying words, and that mere payment of part, or even of the whole, of the purchase-money will not be sufficient under any circumstances to exclude the operation of the statute.

THIS was an action against the defendants, as executors of the late John Humphreys, deceased, who was a brother of the plaintiff, for the breach of an alleged promise by the deceased to devise by

will certain lands to the plaintiff and his son. The promise was a verbal one, but at the trial before Manisty, J., at the last Trinity Sittings at Westminster, it was contended on the part of the plaintiff that there had been acts of part performance sufficient to take the case out of the Statute of Frauds. That learned judge was, however, of opinion that there was no evidence either of the promise or of part performance to entitle the plaintiff to a verdict, and under his direction a verdict was entered for the defendants.

A rule nisi for a new trial on the ground of misdirection was granted by this Court, on appeal from a refusal of the Queen's Bench Division to grant such rule. The facts of the case and the reason for granting the rule nisi are fully stated in the judgment.

McIntyre, Q.C., and *A. L. Smith*, shewed cause.

Wheeler (*Sir H. Giffard, Q.C.*, with him), argued in support of the rule.

Cur. adv. vult.

BAGGALLAY, L.J. The plaintiff in this action and one John Humphreys were brothers; John Humphreys died in August, 1880, and the defendants are the executors named in his will, which was dated the 18th of November, 1879, and was proved by the defendants on the 7th of April, 1881.

On the part of the plaintiff, it is alleged that John Humphreys, for a consideration which will be mentioned presently, promised to make a will in the plaintiff's favour; but that, after making a will in pursuance of such promise, he subsequently revoked it by the will which has been proved by the defendants, under which the plaintiff takes no benefit. The plaintiff claims damages against the estate of John Humphreys in respect of such alleged breach of contract.

Upon the trial, Mr. Justice Manisty gave judgment for the defendants, being of opinion that there was no evidence to go to the jury of any contract binding upon John Humphreys or his estate. A rule for a new trial, on the ground of misdirection, was refused by the Queen's Bench Division; but, upon an application by way of appeal to this Court, a rule nisi was granted, under the

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

circumstances to which I shall presently allude. Cause has now been shewn before us, and I am of opinion that the rule nisi must be discharged. The plaintiff's case, as presented to us, was as follows: that in June, 1879, his brother, John Humphreys, as executor of another brother, William Humphreys, was desirous of selling a farm in Wales, known as Gwaen y Magley, and induced the plaintiff to enter into an agreement to purchase it at the price of 2000*l.*, and to pay a deposit of 200*l.*, by a representation that it was worth 2000*l.* and that the rental of it was 70*l.* per annum; but that, having shortly afterwards discovered that the farm was not worth 2000*l.*, and that the rental of it was only 45*l.*, the plaintiff, on the 11th of August, 1879, wrote to John Humphreys, insisting that the contract should be cancelled and the deposit returned; that John Humphreys thereupon promised him that, if he would complete the purchase, he would on his death devise by will certain other farms and lands, which were his own property, to the plaintiff and his son, and would consent to a reduction of the purchase-money from 2000*l.* to 1800*l.*; that, in reliance upon such promise, and in consideration of it, the plaintiff paid the balance of the purchase-money and completed the purchase of the farm; and that by a will, dated the 20th of August, 1879, John Humphreys devised his own farms and lands as agreed, but afterwards revoked such devise by the will which has been proved.

By his statement of claim, the plaintiff not only claimed damages in respect of the alleged breach of contract, but also to have the will of John Humphreys, which was proved by the defendants, set aside, so far as it revoked the will in favour of the plaintiff and his son, and a declaration that the plaintiff was entitled to a life estate in the farms and lands expressed to be devised by the will of the 20th of August, 1879, with remainder to his son; but the claim, as urged in Court, has been limited to damages for breach of the alleged contract.

The defendants, whilst admitting that a binding agreement for the purchase of Gwaen y Magley was entered into by the plaintiff in June, 1879, and that he subsequently, by the letter of the 11th of August, 1879, attempted to repudiate it, deny that John Humphreys represented to the plaintiff that the farm was worth

2000*l.*, or that the rental of it was 70*l.*; and they allege that John Humphreys, on receipt of the letter of the 11th of August, 1879, refused to entertain the proposition that the contract should be cancelled. They further admit that John Humphreys did in fact make a will dated the 20th of August, 1879, and thereby purported to devise his own farms and lands to or for the benefit of the plaintiff and the plaintiff's son, and that the purchase of Gwaen y Magley was in fact completed by the plaintiff on the 27th of March, 1880; but they deny that any such promise as is alleged by the plaintiff was ever made by John Humphreys, or that the plaintiff completed the purchase of Gwaen y Magley in reliance upon or in consideration of any such promise.

In the arguments before us it was admitted on the part of the plaintiff, as it had apparently been admitted before Manisty, J., and in the Queen's Bench Division, that, inasmuch as the contract, of a breach of which the plaintiff complained, was a contract relating to land, and there had been no memorandum or note thereof in writing within the intent and meaning of the 4th section of the Statute of Frauds, it was necessary for the plaintiff to prove, not only a promise such as that alleged by him, but also a part performance of the contract sufficient to take the case out of the operation of the statute.

In support of the alleged promise reliance was placed by the plaintiff on certain correspondence between the plaintiff and John Humphreys, and particularly on letters dated the 11th and 17th of August, 1879, and on a conversation alleged to have taken place between the plaintiff and John Humphreys on the 1st of September, 1879. The letter of the 11th of August was from the plaintiff to John Humphreys, and in it, after comments upon the difference between the value of an estate of which the rental was 70*l.* and one of which the rental was only 45*l.*, there is a paragraph in the following terms: "Under these circumstances I must beg of you to cancel the contract and let me have a cheque for my deposit of 200*l.*" Certain other letters passed between the plaintiff and John Humphreys, in which the latter pressed the former to complete the purchase, and on the 17th of August, 1879, John Humphreys sent to the plaintiff the letter of the 17th of August, 1879, in which was contained a paragraph in

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

the following terms: "I am very desirous of having no misunderstanding or unpleasantness respecting the purchase of Gwaen y Magley, and I think the best way to avoid it is for you to come down to Berriew and talk the matter over, as perhaps I might be able to tell you something which may induce you without further hesitation to complete the purchase, or you may say something to place me in a position to endeavour to find some one to take it off your hands." The invitation contained in that letter was accepted by the plaintiff, and on the 30th of August he went to the residence of John Humphreys at Berriew, near Welshpool. In the meantime, however, John Humphreys made his will of the 20th of August.

On the 1st of September an interview took place between the brothers at Berriew, at which no other person was present; the account of what occurred at this interview, as given by the plaintiff in his evidence at the trial, is as follows: John Humphreys asked the plaintiff whether he had come to any determination with regard to Gwaen y Magley, to which plaintiff replied that he had not; John Humphreys then said: "Well, Edmund, you remember what I promised you," and plaintiff answered that he did remember; and John Humphreys then added: "Well, Edmund, I have been thinking that, with Gwaen y Magley and with what I am going to leave you by will, you will have a nice little property in this county," and thereupon plaintiff said: "Well under these circumstances, and taking into consideration your letter of invitation of the 17th, I am quite prepared to complete the contract of Gwaen y Magley, and you may depend upon my fulfilling it to the letter." The plaintiff, having thus stated the effect of the conversation between himself and John Humphreys, was asked by Mr. Wheeler, his counsel, "What was the promise which you were supposed to remember?" and replied that the promise so referred to was made in September, 1877, when he and John Humphreys and their sister were walking in the garden and speaking of the sudden death of a brother, and that John Humphreys then said to him: "Edmund, we have come to the conclusion to make your son our heir, as he bears our name, and I think it will be large enough to enable him to stand his ground in the county," and that the plaintiff thereupon thanked his brother

for his kind intentions; the plaintiff added that he could not speak with certainty as to whether John Humphreys said "your son" or "you and your son." It will be observed that the promise thus referred to was made nearly two years before the contract was entered into by the plaintiff for the purchase of Gwaen y Magley. It is further to be observed that, during the conversation on the 1st of September, no reference appears to have been made to the will which had been executed by John Humphreys on the 20th of August, nor to any reduction from the amount of purchase-money for the farm. As regards the former, it does not appear to be material whether the plaintiff was or was not aware, at the time when the conversation took place, that the will dated the 20th of August had been executed; a promise to devise or leave by will, if any such promise was made, would be as well performed by not revoking a will already made as by subsequently executing one of the same purport, and could be as well broken by revoking a will already made as by failing to make one. As regards, however, the reduction of the purchase-money, it appears, from the evidence given by the plaintiff at the trial, that, on the 2nd of September, he went from his brother's residence to Gwaen y Magley, and that, having then formed an unfavourable opinion of the farm, he, on the evening of the 3rd, described to his brother and sister the desolate state of the property, and that thereupon his brother suggested to their sister, who was a co-executrix, with John Humphreys, of the deceased brother William, that they should take off 200*l.* from the price of the farm. The plaintiff returned home on the 4th, and, after his return, some further correspondence took place between him and his brother John, to which it does not appear to be necessary to refer. I believe that I have stated, in sufficient detail, the effect of all the evidence adduced in support of the plaintiff's claim in this action.

In the course of the arguments at the trial, and upon the applications to the Queen's Bench Division and to this Court, the case of *Alderson* v. *Maddison* (1) was much discussed, and the principles enunciated, or supposed to be enunciated, in the judgment delivered in that case, were much relied upon by the counsel for the plaintiff; and it would appear from the shorthand writer's note

(1) 7 Q. B. D. 174.

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

of what took place in this court upon the application for the rule nisi, that it was granted in order that an opportunity might be afforded of considering whether the principles enunciated in the judgment in that case could be put in more strict and formal language. I was a party to that judgment, as were my late colleague Bramwell, L.J., and my present colleague Brett, L.J.; and having regard to the object which this Court apparently had in granting the rule, and particularly to the view which appears to have been expressed by Brett, L.J., that there seemed to him to be something in the phraseology of the judgment in *Alderson* v. *Maddison* (1) which he did not understand, I, at the close of the argument upon the application to make the rule absolute, expressed my desire of having an opportunity of reconsidering the effect of that judgment, and for that purpose our judgment upon the matter under consideration was reserved. I have since given my best attention and consideration to the case of *Alderson* v. *Maddison* (1), and to the several discussions which have taken place with reference to it, when the subject-matter of this action has been under consideration, and I have arrived at the conclusion that the general principle, enunciated in the judgment, as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds, is accurately stated.

That general principle is stated in the following terms:— "Now, it is a well-recognised rule, that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord Hardwicke in the case of *Gunter* v. *Halsey* (2), they must be such as could have been done with no other view or design than to perform the

(1) 7 Q. B. D. 174. (2) Amb. 586.

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

agreement." I believe that the general principle, so enunciated, is supported by all the recognised authorities upon the subject.

The enunciation of the general principle is followed by illustrations in the following terms:—Thus payment of part, or even of the whole, of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy."

It is to the language in which the illustration as to payment of purchase-money is expressed, that the criticisms of the Lords Justices upon the occasion of the application for the rule nisi would appear to apply; and, if I understand the views expressed by them aright, they intimate a doubt whether the general statement that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute," should be qualified by the addition of the words "unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement." It is doubtless true, as was suggested by the Court when the rule nisi was granted, that if a man is found in possession of an estate with no apparent title in writing, he is a trespasser unless he is there by virtue of some agreement; and in such a case inquiry may be made as to what the agreement is; but I do not gather from the authorities that this is the only species of part performance which would be sufficient to take a case out of the operation of the statute, a proposition which might be inferred from some observations appearing upon the notes of the discussion.

During the arguments in *Alderson* v. *Maddison* (1) the case of

(1) 7 Q. B. D. 174.

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

Nunn v. *Fabian* (1) was cited. I was counsel in that case, and well remember it; the facts material to the judgment were as follows:—A landlord *verbally* agreed with his occupying tenant to grant him a new or extended lease for twenty-one years at an increased rent, and with the option of purchasing the freehold; this was the parol agreement. The landlord died without executing any lease pursuant to the agreement, but before his death the tenant paid one quarter's rent at the increased rate, *which was in fact a part payment of the purchase-money for the interest in the land which he was to acquire*, and a receipt in the following terms was signed by the landlord: "Received the 14th January, 1863, of Mr. J. Nunn, the sum of 20*l.* for balance of rent due 29th Sept. last for 60, Western Road, Brighton."

The suit was by the tenant against the devisees in trust of the landlord for specific performance of the parol agreement. The Master of the Rolls had dismissed the plaintiff's bill, and the case came before the Lord Chancellor, Lord Cranworth, by way of appeal. The receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord; moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held *that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate*, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground, and upon that ground alone, he made a decree for specific performance. The decision in *Nunn* v. *Fabian* (1) has been criticised in various quarters, but I am not aware of any subsequent decision which would be inconsistent with it; it certainly has not, so far as I am aware,

(3) Law Rep. 1 Ch. 35.

been overruled by any competent authority. It is quite true that the circumstances of the case were, in several respects, to which I need not allude, very strong in favour of the plaintiff from a moral point of view, and attempts have been made to explain the decision upon other grounds than those assigned by the Lord Chancellor, but nothing can be more clear and definite than the reasons assigned by him for the decision. If *Nunn* v. *Fabian* (1) was rightly decided, and, speaking for myself, I feel bound by it; it would be difficult to distinguish from it a case in which, after a parol agreement for the purchase of a freehold estate at a fixed sum, payment is made by the purchaser of a portion of the purchase-money, and a receipt is given in some such form as the following: "Received of A. B. the sum of 1000*l.* being in part of the purchase-money for my freehold estate at C."; and I am unable to suggest better words than those used in the judgment in *Alderson* v. *Maddison* (2), to cover such cases as *Nunn* v. *Fabian* (1), and that which I have last suggested. So far as I am responsible for the judgment in *Alderson* v. *Maddison* (2), the language which has been criticised was adopted to cover such cases as *Nunn* v. *Fabian* (1), which had been pressed upon us in argument. I understand that the case of *Alderson* v. *Maddison* (2), is under appeal to the House of Lords; if so, I hope an opportunity will be taken of testing the propriety of the decision in *Nunn* v. *Fabian* (1), and the criticised passages in the judgment in *Alderson* v. *Maddison.* (2)

As regards the case now under consideration, there is, in my opinion, no ground for the suggestion that there was any misdirection on the part of Mr. Justice Manisty, when he directed judgment to be entered for the defendants in this action. That learned judge proceeded on the ground, that there was no evidence to go to the jury, either of the alleged promise, or of part performance; in other words, that there was no evidence to go to the jury of any contract binding upon the estate of John Humphreys. Apart from the admitted fact that the subject-matter of the alleged promise was land or an interest in land, there might have been ground for contending that there was evidence of some such promise to go to the jury, though I agree

(1) Law Rep. 1 Ch. 35. (2) 7 Q. B. D. 174.

1882

HUMPHREYS v. GREEN.

Baggallay, L.J.

with Mr. Justice Manisty, and with the judges in the Queen's Bench Division, in thinking that the evidence pointed more to the plaintiff having been influenced by the representations made to him by his brother as to a probable disposition of his property, than to any definite and concluded agreement between them; but, inasmuch as it was admitted that the contract, of which the breach was alleged, related to land, and that there was no memorandum or note of it in writing signed by John Humphreys, no action would lie in respect of such breach, unless there was evidence of a part performance sufficient to exclude the operation of the statute, and of such part performance, I can find no trace. The part performance relied on is the completion of the purchase of Gwaen y Magley; but it cannot be successfully contended that the completion of the purchase was referable only to an agreement that John Humphreys would devise his property in a particular way. Apart from the parol testimony of the plaintiff, which is of course inadmissible for this purpose, the completion of the purchase would appear to be referable to the existing binding contract, and certainly not to any agreement to refrain from repudiating it. The fallacy which appears to me to pervade the arguments on the part of the plaintiff, based upon the supposed authority of *Alderson* v. *Maddison* (1), consist in this, that they relied upon the parol agreement itself to prove that the alleged acts of part performance were referable to that agreement.

BRETT, L.J. I think at the time of granting the rule nisi, or at all events at the end of the arguments of counsel when shewing cause, no member of this Court had any doubt as to what must be the result of the judgment in this particular case, but we granted the rule, and we afterwards reserved the form of the judgment, in consequence of the mode in which part of the judgment in *Alderson* v. *Maddison* (1) had been expressed. If I differ in any respect from what my learned brother has said, it is in the supposition which he seems to entertain, that on the motion for the rule nisi we criticised the language which had been used in *Alderson* v. *Maddison*. (1) I think we should not have ventured to criticise it. We doubted whether my learned brother who

(1) 7 Q. B. D. 174.

wrote the judgment in that case had exactly expressed what we intended to say in part of that judgment, and inasmuch as he was to be a party to this judgment we wished that he should be the person who should explain the language which he himself had used in *Alderson* v. *Maddison*. (1) The judgment in *Alderson* v. *Maddison* (1) was the judgment of the Court, but it was expressed in words written by my learned brother, and I think naturally so, because this doctrine as to taking the case out of the 4th section of the Statute of Frauds is peculiarly an equitable doctrine, which did not depend on any construction of the statute, but on the authority of some cases decided in the Court of Chancery, which we were not prepared to differ from, and we therefore naturally referred the expression of that judgment to the member of the Court who was most conversant with, or at all events as we thought the most competent to deal with, that doctrine, but in adopting his phraseology with the deference that is due to him, we did not quite sufficiently see whether we agreed to every word that was used in that judgment.

As regards this rule in equity, I think it is expressed in the judgment in *Alderson* v. *Maddison* (1) according to the authorities there referred to. But amongst the illustrations the following is there stated: "Payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shewn"—(it does not say how it is to be shewn, and it leaves it open to this that it may be shewn by parol evidence or otherwise)—"that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement." It was with that part of the phraseology of the judgment that, when we came to examine it closely, we thought we could not agree. For my part, I think it unnecessary, and therefore unwise, in the present case to attempt to state affirmatively what are the circumstances which, according to the equitable doctrine, will take a case out of the 4th section of the Statute of Frauds. I must say that I adopt the phraseology of the general rule that there must be acts of part performance, but what those acts must be I think it would be unwise for the present to state my opinion. I have, however, a very strong opinion (and I venture to think

(1) 7 Q. B. D. 174.

1882

HUMPHREYS v. GREEN.

Brett, L.J.

that it is not mine only, but that of the Court of Appeal), that payment of part or even of the whole of the purchase-money under any circumstances that I am aware of, is not sufficient to exclude the operation of the statute. In saying this, I venture to doubt that there having been a part performance was the reason for the judgment in *Nunn* v. *Fabian*. (1) There could be no judge sitting on the Bench desiring to do justice between two parties who would not have strained every effort of his mind to give the judgment which was given in *Nunn* v. *Fabian* (1) if he possibly could. *Nunn* v. *Fabian* (1) was a very peculiar case. It was not the case of the payment of part or even of the whole of the purchase-money simply. There was a contract prepared in writing with all the terms upon which the parties had agreed, the whole of the purchase-money had been paid, and there was a receipt in writing signed by the party sought to be charged. It might, perhaps, then be said that the receipt sufficiently referred to or was identified with the agreement in writing, which contained all the terms. I know not how that may be, but I feel a difficulty in putting the decision in *Nunn* v. *Fabian* (1) on any principle of equity which had before that been determined. If one must say that one differs from *Nunn* v. *Fabian* (1), very respectfully I say I do. It seems to me that according to all the cases in equity payment of part or even of the whole of the purchase-money, if that be all, is not sufficient to exclude the operation of the Statute of Frauds, and if the payment of the purchase-money, even of the whole, be the only act relied on, it seems to me that no evidence can be given to explain that act, which shall make it a sufficient one to take the case out of the 4th section of the Statute of Frauds. With regard to the decision in *Alderson* v. *Maddison* (2), I say again, what I have said before, that I have the most earnest and sincere hope that the House of Lords will see its way to overrule the decision of this Court.

Rule discharged.

Solicitors for plaintiff: *Wright & Pilley.*
Solicitors for defendants: *Gregory, Rowcliffes, & Co.*

(1) Law Rep. 1 Ch. 35. (2) 7 Q. B. D. 174.

W. P.

[IN THE COURT OF APPEAL.]

1882
Nov. 16.

BOLCKOW, VAUGHAN, & Co. *v.* FISHER AND OTHERS.

Practice—Interrogatories—Sufficiency of Answer—Answers as to matters done by the Agent or Servant of the Person interrogated.

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24QLD110
111.2,

A party to a cause is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment; and he is bound to obtain the information from such agents or servants, unless he shew that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of detail or the like.

Therefore in an action by cargo owners against the owners of a ship, for a loss alleged to have arisen from negligence in the navigation of such ship by which she ran ashore and was stranded, an answer by the defendants to interrogatories as to what was done by those on board with regard to such navigation at the time of the accident, which stated in substance that the defendants were not on board at the time and had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which the plaintiffs had had inspection, was held insufficient, as it did not appear that there was any difficulty in the defendants' obtaining the required information from those who were in charge of the ship at the time of the accident.

APPEAL by the plaintiffs from an order of the Queen's Bench Division rescinding an order of Watkin Williams, J., ordering the defendants to make further and better answers to certain interrogatories.

The action was against the owners of the vessel *Claremont* for the loss of a cargo of iron ore which the plaintiffs, in pursuance of a charterparty, had shipped on board such vessel at Villaricos to be carried to Middlesbro'-on-Tees, according to the terms of bills of lading, which, as well as the charterparty, contained the usual excepted perils. The defendants, by their statement of defence, inter alia, alleged that the delivery of the cargo at Middlesbro' was prevented by the perils excepted in the charterparty and bills of lading, and that whilst the said vessel was on the said voyage from Villaricos to Middlesbro' she encountered a thick fog, and during the fog she was stranded, and she and her cargo totally lost.

Interrogatories were delivered on behalf of the plaintiffs for

1882

BOLCKOW v. FISHER.

the examination of the defendants which contained, inter alia, the following, viz.:

5. "At what time of the day on the 27th of January, 1881, was Portland or Portland Bill sighted by those on board of the *Claremont*, and how did Portland or Portland Bill then bear, having regard to the position of the ship? What was the course on which the *Claremont* was being steered when Portland or Portland Bill was first sighted on or about the 27th of January, 1881; how far from the land was the said ship at that time? Were the Portland lighthouses or either of them seen or distinguished by any and what person on board the said ship and when on the said 27th of January? Was not the land covered with snow? What means, if any, were taken to verify the distance of the *Claremont* from the land, or her position when Portland or Portland Bill was sighted? What was the state of the weather at that time? State whether the weather was then foggy or hazy."

14. "Was the lead cast, or were any and what soundings taken, and when and where by those on board the *Claremont* after Portland or Portland Bill was sighted on the said 27th of January, 1881, and prior to the time when the *Claremont* stranded or struck? Was there anything and what to prevent such soundings being taken? If yea, give the result of such soundings?"

18. "Was any and what calculation made on the 27th day of January, 1881, and by whom and when after Portland or Portland Bill was sighted, of the distance run by the *Claremont* from any and what point?"

After several answers which had been held to be insufficient (1)

(1) The following is one of the answers to such interrogatories which was held to be insufficient. "Neither of us or either of the above-named defendants were on board the ship at any of the times referred to in the said interrogatories, and we have no personal knowledge of the matters inquired into. We do not possess the information necessary to enable us to answer the said interrogatories correctly. The matters inquired into, with the exception of such matters as can be ascertained by reference to tide tables and weather reports, can only be answered by taking in great detail the statements of the officers and crew who were from time to time on watch on board the said steamship during the several times of the happening of the matters inquired into and comparing their statements and drawing inferences therefrom. We have not yet obtained full and accurate state-

the defendants made a further answer limited by agreement by way of test to the said 5th, 14th, and 18th of the interrogatories which was as follows:

"We say that we believe Portland Bill was sighted, the ship being on a course about east by south, about 11 A.M. on the 27th of January, 1881, bearing from the ship about north north-east and more than twelve miles distant; that the weather was then hazy. Save as aforesaid, we have no knowledge or information respecting the matters inquired into by the said interrogatories save as appears by the protest dated on the 1st day of February, 1881, a copy of which the plaintiffs have had produced for their inspection, and also all the documents referred to in the defendants' affidavit of discovery filed on the 21st of March, 1882. We have not obtained statements of the officers or of the crew who were from time to time in charge of the said vessel or on watch on board during the several times of the matters inquired into beyond what appears from the said protest and documents scheduled to the defendants' affidavit of discovery. We further say that we are not mariners, and we have no knowledge of the management or navigation of a ship at sea which would enable us to give an opinion upon any of the matters inquired into by the said interrogatories."

Watkin Williams, J., at chambers, was of opinion that this last further answer was insufficient, and he therefore made an order that there should be a further and better answer. The Queen's Bench Division having however rescinded such order on the ground that such last further answer was sufficient, the plaintiffs appealed.

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ments from the said several persons, many of whom are no longer in our employment; some of them we hope to obtain as witnesses at the trial, and we submit that we are not bound to answer as to our belief as to the various matters referred to in the said interrogatories, for to do so would be to disclose the details of the evidence of the witnesses for the defence and our belief as to the same. We believe that very serious prejudice may be caused to us if we are compelled to answer these interrogatories in detail before the trial, and especially before all the proofs to be used at the trial have been prepared. We submit that the said interrogatories have been exhibited unreasonably and vexatiously, and that under the circumstances aforesaid we ought not to be called upon to give any further answers to them."

1882

BOLCKOW v. FISHER.

J Edge (*Manisty*, with him), for the plaintiffs. It is admitted that the log-book has been lost and the interrogatories are administered in order to ascertain what was done by the officers and crew of the vessel just before and at the time of the accident. The defendants in effect answer that they were not on board and do not know what occurred, as they have not inquired about it of their officers. There is nothing to shew that in order to obtain the information required to answer these interrogatories the defendants would be put to any unreasonable inconvenience or trouble, and the information sought is as to what was done by the officers and crew in the ordinary course of their business in navigating the vessel: *Freeman* v. *Fairlie.* (1)

The Court then called upon

Gainsford Bruce, for the defendants. Before the Judicature Acts no further answer than that which the defendants have made would have been required, as under the Common Law Procedure Acts the party interrogated was not required to state anything which was not within his own knowledge: *Phillips* v. *Routh* (2) where Brett, J., says, "Is there any obligation on a party interrogated, to answer what he does not himself know? Is he bound to procure information for the purpose of answering?" and so in *Bechervaise* v. *Great Western Ry. Co.* (3), Willes, J., says: "To ask the secretary of a railway company to state the cause of an accident at which he was not present, hardly accords with common sense." The defendants in the present case, surely are not obliged to examine the officers who were on board of the vessel about the time of the accident, and then disclose to the plaintiffs the evidence they have obtained for their defence; that would be equivalent to shewing the brief for the defence. Before the Judicature Acts the defendants could not have been asked as to what was not within their own knowledge, and the Judicature Acts have not altered this. As stated by Grove, J., in *Dalrymple* v. *Leslie* (4): "no doubt the words of s. 25, sub-s. 11, of the Judicature Act, 1873 are, that generally the rules of equity are to prevail, but it has never been decided how far the practice in Chancery with respect to interrogatories, is to prevail," and in

(1) 3 Mer. 29.
(2) Law Rep. 7 C. P. 287, at p. 288.
(3) Law Rep. 6 C. P. 36, at p. 38.
(4) 8 Q. B. D. 5, at p. 7.

1882

BOLCKOW v. FISHER.

Parker v. *Wells* (1), Brett, L.J. observes, "that there having been a difference between the rules in Chancery and at common Law on this subject, it was the intention of the Judicature Acts and rules to introduce a new intermediate practice." The case of *The Minnehaha* (2) is the only case in which it has been held that it was not sufficient for a party to state, in answer to interrogatories, that he is wholly unacquainted with the facts about which he is interrogated, and that he was bound to answer as to his information and belief, but that was a decision by the Court of Admiralty which expressly acted in accordance with the principles of the Chancery practice. These interrogatories moreover go beyond the happening of certain facts, they inquire into the details of the defendants' evidence, and therefore ought not to be allowed: *Benbow* v. *Low*. (3)

BAGGALLAY, L.J. This is an action by the owners of a cargo against the shipowners, on the ground that the loss of the ship and her cargo were due to the negligence of those navigating the ship. In the course of the action certain interrogatories were exhibited for the examination of the defendants, the shipowners; and amongst other things the defendants were interrogated as regards the navigation of the ship previous to and at the time of the accident. In the first instance the defendants put in an answer which was held to be not sufficient. They put in a further answer, and that again was held not sufficient, and a third answer was put in, and that third answer, by a very convenient arrangement between the parties, has been treated as limited to three interrogatories, the 5th, 14th, and 18th, because the grounds on which the defendants wished to rely could more conveniently be stated with regard to those interrogatories.

This third answer was in these terms. [The Lord Justice read this third answer to the 5th, 14th, and 18th interrogatories.]

Now it has been contended by Mr. Gainsford Bruce on the part of the defendants that if this had been an action prior to the Judicature Acts no such discovery could have been obtained as is here sought, and further that the rules of the Judicature Act, 1875, are not applicable to such a case as the present.

(1) 18 Ch. D. 477, at p. 485. (2) Law Rep. 3 A. & E. 148.
(3) 16 Ch. D. 93.

1882

BOLCKOW v. FISHER.

Baggallay, L.J.

I propose to deal with this last part of his contention first. There is no doubt that before the Judicature Acts there was a difference between the practice at Common Law and in Chancery as regards discovery from parties. The old rule in Chancery was this—if you do not plead or demur you must answer fully. There is no doubt that that rule often operated prejudicially and in a hard way upon parties, and it has been greatly modified by the rules under the Judicature Acts. So far as I am acquainted with the rules as to discovery in the Common Law Courts before the Judicature Acts, the Judicature rules have increased the power which existed of enforcing discovery. These rules are set forth in Order XXXI., and the first of them is drawn in a very wide manner so as to give all possible right of discovery, but it is followed by other rules which are made for the purpose of preventing that first rule being put in force in a manner which would be unfair or prejudicial to the parties. The rules apply to discovery by affidavit and also to inspection, but we are now dealing only with discovery by affidavit.

I may remark in passing that, by sub-s. 11 of s. 25 of the Judicature Act, 1873, where there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter the rules of Equity shall in general prevail. Now the 1st rule of Order XXXI. is in these terms:—"The plaintiff may at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties or any one or more of such parties." I need not read the rest of that rule. The rule is in the most general terms except that the plaintiff cannot interrogate until he has delivered his statement of claim, and the defendant cannot interrogate until he has delivered his statement of defence, so that if any question should arise upon the propriety of enforcing the interrogatories there would be the means of considering what were the questions really raised in the action. The effect of the generality of that

rule is first modified by the 5th rule, which states that "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not bonâ fide for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action or on any other ground, may be taken in the affidavit in answer." Then by rule 8 there is a provision as to how an objection to answer interrogatories may be raised; and afterwards there is rule 19 of the same order, which is a very important one, viz., that if the right to discovery depends on the determination of any issue or question in dispute in the cause, or if for any other reason any question in dispute should be determined first, the Court will not in the preliminary stages allow the interrogatories to be administered. That particularly applies to such a case as that of *Benbow* v. *Low* (1), where the nature of the interrogatories was to know to whom the plaintiffs, who were the parties interrogated, had sold at different times and for what prices quantities of soap alleged by the defendants to have been manufactured by the plaintiffs under an infringement of a trade mark, and where therefore the right to such discovery depended upon the determination of the preliminary question whether there had or not been any infringement of the trade mark.

Now to apply these rules to the case which is before us. A shipowner, as a general rule, has no knowledge whatever of the details of the navigation of his ship which led up to or preceded its loss, unless he happened to have been on board and to have been his own sailing master. Certainly the practice in the Court of Chancery, prior to the Judicature Acts, was this, that where an act was done by an agent which the principal himself could not have done, the right to require information as to the acts of such agent, was beyond all question. Of course it was governed by that which is embodied in the 5th rule, and if the interrogatory was for the purpose of increasing costs or was irrelevant, the interrogatory would be disallowed. When, however, the interrogatories were as to matters, the knowledge of which was essential to the ascertaining of the rights of the parties to what was in issue in the cause, I have certainly never known an instance in which

(1) 16 Ch. D. 93.

1882

BOLCKOW v. FISHER.

Baggallay, L.J.

the Court of Chancery refused to allow them to be put, because they were as to the acts of an agent of the party interrogated. *Attorney-General* v. *Rees* (1) appears to me very nearly to resemble the case now before the Court. There the question was as regarded the working of a mine and, although it did not appear from the answers that the shaft was sunk by workmen in the employment of the defendant, the owner of the mine, the Court proceeded upon the assumption that the work must have been done by his workmen, and held that he was bound not only to answer with regard to his own knowledge, but to obtain information from the persons by whom, as his agents, the act was done.

As regards the practice of the Common Law Courts before the Judicature Acts I speak with considerable diffidence; but I do not think that the cases which were cited of *Phillips* v. *Routh* (2) and *Bechervaise* v. *Great Western Ry. Co.* (3) establish that the plaintiffs could not have demanded discovery in such a case as this even before the Judicature Acts. But all these matters are now regulated by the rules under the Judicature Acts, and applying those rules to the present case, I feel bound to hold that the judgment of Watkin Williams, J., was right, and that the order by the Divisional Court for its reversal ought not to have been made.

9 QBD 463.

BRETT, L.J. I do not detract from what it is reported I said in *Parker* v. *Wells*. (4) I am still of opinion that the questions arising as to interrogatories and discovery are now governed, not exclusively by what was the practice in Chancery, or exclusively by what was the practice at Common Law, but by the rules under the Judicature Acts.

It follows from that, as it seems to me, that that part of Mr. Bruce's argument is wrong, in which he argued that there was a different rule as regards interrogatories in a Common Law action and in a Chancery suit. The truth is there is no such distinction, for the actions are now all actions in the High Court, and the rule as to interrogatories and discovery is the same in all actions.

The question is whether the answer which has been given

(1) 12 Beav. 50.
(2) Law Rep. 7 C. P. 287.
(3) Law Rep. 6 C. P. 36.
(4) 18 Ch. D. 477.

to certain interrogatories in this case is or is not sufficient; the interrogatories not having been objected to and being admitted to be proper ones, the defendants, it is contended, are not bound further to answer because, in order to give such further answer, they must make certain inquiries of their servants or agents, and it is argued that they are not bound to do so, and that it is sufficient for them to say that they were not personally present when the acts inquired into were or were not done, but that their servants or agents were. In my opinion that of itself is no excuse for not answering. In my opinion a party is not excused from answering with regard to certain acts by saying that he himself was not present when those acts might have been done, but his servants or agents were, if those acts were such as in the ordinary course of business would be done by or be known to his servants or agents. I think, however, that he would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business. And although the acts might be such as would be known to his servants or agents in the ordinary course of business, I think he would sufficiently answer by saying that whether such acts were or not done was not personally known to himself, and that the person who was his servant or agent at the time at which they were supposed to have been done was no longer his servant or agent, or under his control, or in such a position that it would not be reasonable to force him to communicate with him. That is not the present case, where, on behalf of the defendants, it is contended that although the acts, in the ordinary course of business, would be the acts of their servants or agents or known to them, and although such servants or agents were still in their employment or under their control, and there would be no difficulty whatever in obtaining the information from them, yet that the defendants were not bound to answer, because they themselves were not personally present.

That is a contention which, in my opinion, cannot be supported, and therefore there must be a further answer subject to the rule which we have endeavoured to lay down.

Then it is further said, that a party to a cause cannot be asked to give the contents of his brief. That is a figurative expression,

1882

BOLCKOW v. FISHER.

Brett, L.J.

and I take it to mean that though a party may be asked with regard to certain facts he cannot be asked with regard to the evidence of those facts. Therefore, in such a case as this, the defendants may be asked as to material facts whether they did or did not happen on board their ship, but they cannot be asked as to what evidence they have to shew whether those facts did or did not exist. I think also that there is a limit to the enforcement of inquiry and that if a party can shew that in order to answer the questions put it would be wholly unreasonable to require him to make the necessary inquiries, that is to say, that it would cause him an unreasonable expense, or that the questions are such that an unreasonable amount of detail is asked, there might be ground for saying that, although he had not answered specifically every part of the interrogatories he had nevertheless answered sufficiently.

In the present case it is obviously consistent with the answers which the defendants have put in, that they knew who were the officers of the watch on board the vessel during the times in question, and that such officers were still their officers, and might even have been in their office at the time when they declined to answer these questions, and that they purposely abstained from asking them whether soundings were taken or not. The question whether or not soundings were taken is a question of fact, which would be known to the officer of the watch in the ordinary course of business. Such officer is a servant of the defendants, and therefore the defendants are bound to make inquiries of him in order to answer the interrogatories. Consequently I am of opinion that the decision of Watkin Williams, J., at chambers, was correct, and that of the Divisional Court wrong.

LINDLEY, L.J. I also am of opinion that these interrogatories are not sufficiently answered. The question which is raised is one of principle and of considerable importance. The facts are simple. The action is by the owners of a cargo against the owners of a ship, for the loss of the cargo. The ship was being navigated by the agents and servants of the defendants, and the interrogatories are addressed to the defendants with a view to ascertain what they did or did not do by their agents or servants. That is the scope of the

1882

BOLCKOW v. FISHER.

Lindley, L.J.

inquiry. Now, can a person who is interrogated as to what he did by his agents and servants, say, I do not know as I was not present, and I will not ask my agents and servants what was done? I think that it would be entirely contrary to principle altogether if he could do so. It seems to me that where a party is interrogated as to matters done, or omitted to be done, by his agents and servants in the course of their employment, he does not sufficiently answer, by saying that he does not know and that he has no information upon the subject. He is bound to go further and obtain information from such agents or servants of his, or he must shew some sufficient reason for not doing it. I have always understood that to be a settled principle in Chancery. It is very true that, when you come to look into the authorities, most of them apply to the discovery of documents, but I do not see that there is any difference in principle between setting out the facts in an affidavit of documents and in answering interrogatories. *Attorney-General* v. *Rees* (1) is a case in point as to answering interrogatories, as distinguished from the discovery of documents. The same principle appears to me to apply to both.

When we consider the alternative, it will be seen at once that the power of obtaining admissions from a defendant would be perfectly useless if he were allowed to say, "I do not know, and I will not ask." The knowledge of the defendants' servants and agents obtained by them in the course of their employment is his knowledge. Of course, the servant or agent may die, or may be at some place or other where he cannot be got at; but if that be the case let the defendants say so.

It appears to me that the order of Mr. Justice Watkin Williams was right, and that a further answer must be put in by the defendants to these interrogatories.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Parker, Garrett, & Parker.*

(1) 12 Beav. 50.

W. P.

1882 THE GUARDIANS OF SALFORD UNION, APPELLANTS; THE OVER-
Dec. 21. SEERS OF MANCHESTER, RESPONDENTS.

Poor-law—Settlement by Residence—Illegitimate Child above Sixteen—Idiot—Residence as part of Family—24 & 25 Vict. c. 55, s. 10; 28 & 29 Vict. c. 79, s. 8; 39 & 40 Vict. c. 61, s. 34.

16 QBD 317

The pauper, an illegitimate child, and an idiot from her birth, resided after the age of sixteen for more than three years continuously in P. with her mother and her mother's husband, living as part of their family:—

Held, that, notwithstanding the circumstances of her residence, she had under the Divided Parishes Act (39 & 40 Vict. c. 61, s. 34,) acquired a settlement in P.

SPECIAL CASE under 12 & 13 Vict. c. 45, s. 11:—

On the 31st of July, 1882, the respondents obtained an order of justices of Manchester adjudicating the settlement of Alice Gerard, an idiot pauper, to be in the township of Pendleton, Lancashire, and in the appellant union.

1. The pauper, a single woman, is the illegitimate daughter of Margaret Gerard (afterwards Margaret Harding), and was born at Warrington, Lancashire (not in the appellant union), on the 18th of January, 1854; and she is now and always has been an idiot.

2. The mother of the pauper before the pauper had attained the age of sixteen years, viz. in 1864, intermarried at Warrington with one George Harding, a glass-cutter, who was born at Birmingham, and served seven years legal apprenticeship there, and is now dead.

3. In the year 1875, the pauper and her mother and George Harding came to reside in the township of Pendleton, where they resided together until September, 1881, when they removed to Manchester, where they resided together until the pauper became an inmate of the Manchester workhouse.

4. Previously to and since 1875, the pauper has always resided continuously with her mother and George Harding as part of their family, and has never separated herself from them.

5. The pauper is now and always has been incapable of taking care of herself, through imbecility of mind.

The respondents contend, and the appellants deny, that the pauper, upon the above facts, is settled in the township of

1882

GUARDIANS OF SALFORD v. OVERSEERS OF MANCHESTER.

Pendleton, in the appellant union, by reason of her residence therein for three years, under the provisions of 39 & 40 Vict. c. 61, s. 34.

The question for the opinion of the Court is, whether on the above facts the legal settlement of the pauper is in the township of Pendleton.

Dec. 14. *Smyly*, for the respondents. In the circumstances stated in the case, the pauper was by virtue of 39 & 40 Vict. c. 61, s. 34, legally settled in Pendleton and removable thereto. Not having resided a year in Manchester she obtained no status of irremovability; and, being twenty-one years old, Harding, with whom she had resided as a mere visitor, was under no obligation to maintain her. By her residence in Pendleton for six years she acquired a settlement in that union, and therefore the order of the justices was right. It will be said that, being an idiot incapable of maintaining herself, the pauper could not acquire a settlement: but that is clearly inconsistent with the decision in *Reg.* v. *Leeds Union* (1) which is expressly in point in favour of the respondents. And see *Fulham Union* v. *Isle of Thanet Union.* (2) *Rex* v. *Much Cowarne* (3) is no authority for the appellants: it was decided before 9 & 10 Vict. c. 66, and was the case of a legitimate child who, being an idiot and incapable of providing for himself, still remained a member of his parent's family.

F. Marshall, for the appellants. Whilst residing with her mother and Harding in Pendleton, the pauper was by reason of her infirmity of mind incapacitated from acquiring a settlement, such residence being a mere residence as a member of the family of Harding, which conferred upon her no independent status, and consequently she is to be looked upon in the same light as an unemancipated infant of tender years who could not be removed from her mother: *St. Mary Arches, Exeter* v. *Manchester Overseers.* (4) In Nolan's Poor Laws, vol. i. pp. 319, 320, it is laid down, that, the reason of drawing a distinction between separation before and after the child has attained the years of maturity ceases when imbecility of mind or body induces the necessity of

(1) 4 Q. B. D. 323.
(2) 6 Q. B D. 610; 7 Q. B. D. 539.
(3) 2 B. & Ad. 861.
(4) 31 L. J. (M.C.) 77.

1882

GUARDIANS OF SALFORD v. OVERSEERS OF MANCHESTER.

its continuing in a state of perpetual pupilage. "Again," in 2 Nolan, p. 369, it is said that "a child within the age of nurture cannot be removed from the mother, so that, if the latter be settled in a different parish from her child, and reside there, the place in which the infant is settled must maintain it during such residence with the mother: and the law is the same whether it be a legitimate or a natural child: *Shermanbury* v. *Bolney* (1); *Rex* v. *Saxmundham*." (2) There is an obvious distinction between *Reg.* v. *Leeds Union* (3) and the present case: the child there was separated from its mother. The passage cited from 2 Nolan was cited with approval in *Rex* v. *Much Cowarne*. (4) Being by reason of her infirmity incapable of acquiring a new settlement, her proper place of settlement was her birth settlement. *Fulham Union* v. *Isle of Thanet Union* (5) turned upon whether or not a person who resided in a refuge was a person to whom the exception in 9 & 10 Vict. c. 66, s. 1, as to a "charitable gift" could apply. [He also referred to *Reg.* v. *Leicester*. (6)]

Cur. adv. vult.

Dec. 21. The judgment of the Court (Hawkins and Watkin Williams, JJ.,) was delivered by

HAWKINS, J. The question for our decision is whether the pauper was legally settled in Pendleton, and removable thereto. We are of opinion that she was, and that her settlement in that township was acquired by her residence therein for three years, under the provisions of 39 & 40 Vict. c. 61, s. 34.

It was not denied by the appellants that the pauper's residence in Pendleton from 1875 to 1881 was such as to confer upon her a status of irremovability from that township from the expiration of the first year of that residence until her removal with Harding and her mother to Manchester in September, 1881, under the statutes 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8; nor that such status of irremovability for upwards of three years gave her a settlement in Pendleton, under 39 & 40 Vict. c. 61, s. 34, if under the circumstances of

(1) Carth. 279.
(2) Fort. 307, nom. *Rex* v. *St. Giles-in-the-Fields*, Burr. S. C. 2.
(3) 4 Q. B. D. 323.
(4) 2 B. & Ad. 861.
(5) 6 Q. B. D. 610; 7 Q. B. D. 539.
(6) 2 B. & C. 889.

such residence she was capacitated to acquire a settlement in her own right: but it was contended that she was not so capacitated, because during all the time of such residence she was an idiot unable to maintain or take care of herself; and that such residence was a mere residence as a member of the family of Harding and her mother, and conferred upon her no independent status; and that she ought to be looked upon in the same light as an unemancipated infant of tender years, who could not be removed from her mother. In effect this argument was, to invite us to treat the pauper as legitimate for the purpose of incapacitating her to obtain either a settlement or a status of irremovability, but to treat her, as we are bound to do, as illegitimate for the purpose of preventing her from taking the settlement acquired by Harding by reason of his residence in Pendleton, as she would have done had she been legitimate.

In support of his contention, Mr. Marshall cited passages from Nolan, vol. i., p. 320, vol. ii., 369; *Rex.* v *Much Cowarne* (1); and *Reg.* v. *St. Mary Arches, Exeter.* (2) We do not in the least degree dissent from anything which is to be found in either of those passages or authorities. On the contrary, we entirely assent to them. But, in our opinion, they have no applicability to the present case; for, those authorities had reference to legitimate children, whilst we are dealing with an illegitimate pauper of full age.

We take it to be clear law, that so long as a child, legitimate or illegitimate, is within the age of nurture,—an age which covers the whole period from birth to the age of seven years,—it cannot legally by any order of removal be separated from its mother. "It is," said Bayley, J., "entitled to remain with its mother as long as the purposes of nature requires:" *Rex* v. *St. Nicholas, Leicester.* (3) And even the consent of the mother cannot justify such a separation: the rule is made for the benefit of the child: *Reg.* v. *Birmingham.* (4) The statute 9 & 10 Vict. c. 66, s. 3, extended this period of non-separation of a child from its parent, by enacting that no child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with his or her

(1) 2 B. & Ad. 861.
(2) 31 L. J. (M.C.) 77.
(3) 2 B. & C. 891.
(4) 5 Q. B. 210; 13 L. J. (M.C.) 1.

1882

GUARDIANS OF SALFORD v. OVERSEERS OF MANCHESTER.

father or mother shall be removed in any case in which such father or mother may not lawfully be removed.

At this point there is a wide difference between the status of a legitimate and an illegitimate child. In the case of a legitimate child, the liability of its parents to maintain it is not limited to the age of sixteen, but extends to an indefinite period, if the child, whether from imbecility of mind or infirmity of body, is unable to maintain or provide for itself: so long as it remains an unemancipated member of its father's family, no matter what its age may be, it follows and takes in law its father's settlement, and it gains no independent status by reason of any residence in a parish so long as such residence is merely as a member of its father's family: and its right to take such newly acquired settlement of its father's ceases only upon its becoming emancipated or acquiring a new settlement for itself. After the happening of either of those events, even though residing with its father, its residence is for all purposes of settlement and removal, an independent residence: see, among other cases, *Rex* v. *Everton* (1); *Rex* v. *Bleasby*. (2) The case of an illegitimate child is totally different. It is true, its maintenance to the age of sixteen is provided for by statute; 4 & 5 Wm. 4, c. 76, s. 71, enacting that its mother shall maintain it as part of her family till it attains the age of sixteen; and if before that time arrives she marries, the liability to maintain such child as part of his family until it reaches that age is imposed on the husband of its mother. (3) On the arrival, however, of an illegitimate child at the age of sixteen, all legal obligation towards it on the part both of the mother and her husband ceases: it is no longer legally attached to and ceases to be a member of the family, in its legal sense, of either: and, though as an act of kindness they may permit it to live with them, and maintain it as one of the "family" in the popular sense of the term, such residence amounts to no more than would the residence of a total stranger to whom food, lodging, and raiment might be voluntarily given as an act of pure Christian charity; and, as regards its settlement, that is by law (until it acquires one for itself) established in the place of its birth, or in the place of its mother's settlement if she have one which

(1) 1 East, 526. (2) 3 B. & A. 377. (3) 4 & 5 Wm. 4, c. 76, s. 57.

the child is capable of taking; but in no case does it take any settlement the mother's husband may acquire, even during the time the child is a legal member of his family.

As to the settlement of an illegitimate child, see 4 & 5 Wm. 4, c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35; *Reg.* v. *St. Mary, Newington* (1); *Bodenham* v. *Saint Andrew's, Worcester* (2); and *Manchester* v. *St. Pancras.* (3)

The Queen v. *Much Cowarne* (4) would have been in point in favour of the appellants had the pauper in the present case been legitimate; but it is no authority, the pauper being illegitimate. The same observation may be made upon the case of *Reg.* v. *St. Mary Arches, Exeter* (5); for, the doctrine of emancipation or non-emancipation is altogether inapplicable to illegitimate children, whose unfortunate position is such that, after arriving at the age of sixteen, they have no title to be ranked as members of any family, and are in law looked upon in no other light than as mere strangers. The case of *The Queen* v. *Leeds Union* (6) seems to us to be directly in point in favour of the respondents, and we are unable to distinguish it from the present. In each case the pauper was illegitimate; in each case it was in fact separated from its mother. In the Leeds case it was in the hands of strangers to it: in the present case it was an inmate of the Manchester workhouse. In each case it was unable to choose a residence for itself; the one pauper being a mere infant, the other being an idiot. If any distinction can be pointed out, it is the fact that, in the Leeds case, the pauper was within the age of nurture, whilst here the pauper is upwards of twenty-one years old. In principle the cases are identical.

Our judgment therefore is for the respondents.

Judgment for the respondents.

Solicitors for appellants: *Chester, Mayhew, Broome, & Griffithes, for Hulme, Foyster, & Waddington, Manchester.*

Solicitors for respondents: *Johnson, Weatherall, & Co., for Lings, Manchester.*

(1) 4 Q. B. 581.
(2) 1 E. & B. 465.
(3) 4 Q. B. D. 409.
(4) 2 B. & Ad. 861.
(5) 31 L. J. (M.C.) 77.
(6) 4 Q. B. D. 323.

J. S.

1883
Jan. 16.

WATKINS *v.* RYMILL.

Contract—Repository for Sale of Horses and Carriages—Receipt delivered to Customer—Incorporation of Conditions exhibited upon Premises—Presumption of Assent.

The defendant was keeper of a repository for the sale on commission of horses and carriages. The plaintiff delivered to him a waggonette to be sold, and took from him a printed form which contained a receipt for the waggonette, followed by the words, "Subject to the conditions as exhibited upon the premises." By one of the conditions exhibited upon the premises the defendant had power to sell any property sent to their repository which remained over one month unless all expenses were previously paid. The plaintiff did not read this receipt, but put it in his pocket without noticing it. The defendant having sold the waggonette in the exercise of the power of sale in the conditions, the plaintiff brought an action to recover its value, and at the trial the jury, having been directed that the question was whether the defendant had or had not given the plaintiff reasonable notice of the conditions, found a verdict for him:—

Held, that the jury had been misdirected, for the condition was not unreasonable, and, having regard to the circumstances, there was nothing to take the case out of the general rule that if a document in a common form is delivered by one of two contracting parties to and accepted without objection by the other, it is binding upon him, whether he informs himself of its contents or not, and that judgment ought to be entered for the defendant without a new trial, for there was no evidence upon which the jury could have properly found for the plaintiff.

Zunz v. *South Eastern Ry. Co.* (Law Rep. 4 Q. B. 539); *Henderson* v. *Stevenson* (2 H. L., Sc. 470); and *Burke* v. *South Eastern Ry. Co.* (5 C. P. D. 1) considered.

RULE calling on the plaintiff to shew cause why the verdict found for him in the Mayor's Court, London, should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

Dec. 18. *J. J. Sims*, shewed cause.

J. A. McLeod, Q.C. (*C. Hall*, Q.C., and *Dickens*, with him), in support of the rule.

Cur. adv. vult.

The facts and arguments sufficiently appear in the judgment.

Jan. 16. The judgment of the Court (Hawkins, J., Stephen, J., and Watkin Williams, J.), was delivered by

STEPHEN, J. This case was argued before my Brothers Hawkins and Watkin Williams, and myself, at the last Sittings, on a rule

to shew cause why the verdict found in the Mayor's Court for the plaintiff should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

The facts of the case were as follows: The plaintiff was the owner of a waggonette and the defendant was the keeper of a repository for the sale on commission of horses, carriages, and harness. On the 11th of May, 1878, the plaintiff took the waggonette to the repository and left it to be sold, receiving for it a receipt on a printed form which was in these words: "Herbert Rymill's Royal Repository, Barbican, for the sale of horses, carriages, harness, &c. Sales by auction every Tuesday and Friday at 11. Received from ——, *subject to the conditions as exhibited on the premises*" (these words were italicized). "The proceeds paid on Monday between the hours of eleven and four upon the production of the receipt signed by the owner, or forwarded by post if desired."

The conditions exhibited on the premises were printed conditions, exhibited in conspicuous positions in many parts of the premises. The following were the conditions bearing upon the present case:—

"10. Should any horse or other property sent to this repository remain over one month the proprietor shall be at liberty to sell the same by public auction only, with or without notice to the owner, unless all expenses are previously paid. All horses, carriages, carts, &c., sent to this repository for sale remain at the risk of the owner."

Amongst the terms were the following:—

"Two shillings and sixpence per week standing for four wheel carriages and Hansom cabs. . . . Two shillings and sixpence for washing each carriage.

"No horses or other property allowed to be taken away until the keep, sale, and other expenses are paid."

The plaintiff swore that he did not read the receipt, but put it in his pocket without noticing it. About a month after leaving the waggonette the plaintiff called and asked after it. He was told (but not so far as it appeared by the manager or by any

1883

WATKINS v. RYMILL.

person authorized to tell him) that the waggonette was sold, and that the settling day was Monday. He returned on Monday and saw the manager, who told him he must bring the receipt. He said he had lost it, but that they must have his name on their books. They refused to go into the matter without the receipt. The receipt was not found until the 25th of October, 1881, and during this time the plaintiff took no steps except calling two or three times to make inquiries. In November, 1881, the plaintiff through his solicitor applied for the waggonette, and found that it had shortly before been sold for 9*l.* 19*s.* 6*d.*, of which the whole except 6*s.* 10*d.* was due for charges under the terms stated in the conditions quoted. The defendant sent the plaintiff a post office order for 16*s.* 10*d.*, mistaking the amount of his charges, and thus considered himself to have overpaid him.

The defendant's counsel argued that the Common Serjeant, who sat as judge, ought to direct the jury on these facts to find for the defendant, but the Common Serjeant held that the question was one "for the jury whether the defendant had or had not given the plaintiff reasonable notice of the conditions." This question the jury answered in the negative, and gave a verdict for the plaintiff for 21*l.*

The question whether the direction given to the jury was correct depends upon a review of a variety of authorities which it is not altogether easy to reconcile. We will examine them in the order of their dates. Passing over earlier decisions which bear upon the subject indirectly, we may notice first the case of *Van Toll* v. *South Eastern Ry. Co.* (1), decided in 1862. In this case it was decided in substance that a person who deposited a bag at a cloak-room was bound by a notice printed on the back of a ticket which she received when she made the deposit and produced when she demanded the bag, which had been given to another person. In this case Erle, C.J., based his judgment for the defendants on the fact, amongst others, that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits. Willes, J., said (2): "Assuming that the plaintiff did not read the terms of the conditions, it is evident that she knew

(1) 12 C. B. (N.S.) 75. 8 Jur. N.S. 1213.

(2) 12 C. B. (N.S.) at p. 87. 8 Jur. N.S. 1213

that they were there, and that she was satisfied to leave the goods upon those terms. The obvious result of this is that either she must be taken to have assented to the terms, or, if she did not assent, she knew that there were terms which the railway company intended to stipulate for."

The next is *Lewis* v. *McKee*. (1) The facts of this case were dissimilar to the other, and need not be stated; but in the course of his judgment upon them, which was that of the Exchequer Chamber, Willes, J., restates the principle involved in *Van Toll* v. *South Eastern Ry. Co.* (2) in such a way as to imply (though he does not exactly state) that upon the delivery by one of two contracting parties to the other of a written document stating the terms on which the party who produces it proposes to contract, the other party acts at his peril if he does not read it.

The next case in order of time is *Zunz* v. *South Eastern Ry. Co.* (3), decided in 1869. In this case the railway company sought to protect themselves against liability for the loss of a passenger's luggage between Calais and Paris by a condition printed on a ticket to Paris exempting themselves from liability for losses off their own line. The Court of Queen's Bench were unanimously of opinion that the condition on the ticket was part of the contract, and Cockburn, C.J. (4), laid down the law as follows: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print on his ticket, which he only gets at the last moment after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get the ticket by the next comer—still we are bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and to be bound by them."

Cockburn, C.J., does not say to what authorities he referred: probably *Van Toll* v. *South Eastern Ry. Co.* (2) and *Lewis* v. *McKee* (1) would be two of them. They are the strongest cases in that direction which we have been able to find, though they do not appear to have been cited in the argument, which turned to a great extent upon other topics.

(1) Law Rep. 4 Ex. 58.
(2) 12 C. B. (N.S.) 75.
(3) Law Rep. 4 Q. B. 539.
(4) Law Rep. 4 Q. B. at p. 544.

1883

WATKINS v. RYMILL.

However this may be, the principle thus stated would be sufficient to decide this case if the decision stood alone. It is in some respects a stronger case against the defendant than the present one, as the power of railways to impose conditions on passengers is to a considerable extent limited by statutes which have no application to the case of repositories. There have, however, been several subsequent decisions which, though not inconsistent with *Zunz* v. *South Eastern Ry. Co.* (1), shew that it cannot be regarded as a complete statement of the law.

The first of these which may be noticed is *Henderson* v. *Stevenson* (2), decided in 1875. In this case a passenger by a steamboat took a ticket on the face of which appeared the words "Dublin to Whitehaven." On the back were the words, "The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants or otherwise." There was no reference on the front of the ticket to the back of it, and the plaintiff swore that he did not look at it. It was held that the notice did not affect the company's liability. The facts of the case were so peculiar that it can hardly form a precedent for any other. It certainly does not appear that the steamboat company were guilty of fraud, but it does appear that they attempted to rid themselves of a common law liability by annexing to their contract to carry a condition most unusual in itself, and to which the course adopted by them would not naturally call the attention of the other party to the contract. The principle upon which the case was decided is expressed in a very few words by Lord Cairns (3): "The question does not depend upon any technicality of law or upon any careful examination of authorities. It is a question simply of common sense. Can it be held that when a person is entering into a contract containing terms which de facto he does not know, and as to which he has received no notice, that he ought to inform himself upon them? (the words "he is to be bound by those terms," or some equivalent, appear to have dropped out of the report). "It appears to me impossible that that can be held." It may be added that though the case was decided mainly on this

(1) Law Rep. 4 Q. B. 539. (2) Law Rep. 2 H. L., Sc. 470.
(3) Law Rep. 2 H. L., Sc. at p. 475.

ground, several of their Lordships, and in particular Lord Chelmsford and Lord Hatherley, entertained doubts as to the right of the defendants to attach such a condition as the one in question to the contract to carry. Lord Chelmsford says "that of course a person may if he chooses take the whole risk of the voyage on himself, but the company by a mere notice without such assent can have no right to discharge themselves from performing what is the very essence of their duty."

The circumstances of the present case have an analogy to those of *Henderson* v. *Stevenson*. (1) The notice was printed on the face of the receipt, and formed a prominent part of it. The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made, and it appears to us that by handing to the plaintiff the receipt in question the defendants called his attention to the subject as pointedly as if their clerk had said "Read this. It expresses the terms on which we are ready to take your waggonette."

The next case to be considered is *Harris* v. *Great Western Ry. Co.* (2), decided in 1876. In this case the luggage of a person who had been a passenger by the Great Western Railway was deposited by her brother on her behalf with the servants of the railway at the cloak-room, and the depositor received a ticket which on its face enumerated the articles received, stated the charge at 2*d.* for each, and ended with these words, "Left in the name of ——, and subject to the conditions on the other side." On the back were conditions, one of which limited the liability of the company to 5*l.* for each package, unless a certain higher rate were charged. The person who deposited the articles said that he did not read the conditions on the back of the ticket, but admitted that he "believed there were some conditions."

The judges of the Queen's Bench Division held that the plaintiff was bound by the conditions on the back of the ticket. The judgment of Lord Blackburn in this case seems specially worthy of attention, though there was no difference of opinion in the Court.

(1) Law Rep. 2 H. L., Sc. 470. (2) 1 Q. B. D. 515.

1883

WATKINS v. RYMILL.

Lord Blackburn elaborately distinguishes the case from *Henderson* v. *Stevenson* (1) on grounds similar to those which we have already stated. The shortest expression of his view is on p. 531. He there says that in *Henderson* v. *Stevenson* (1) there was nothing to shew that the steamboat company would believe from the conduct of the passenger that he had represented to them that he had read or looked at the back of the ticket, and in point of fact he had not. In the following page Lord Blackburn states the reasons which led him to the conclusion that in the case then before him the plaintiff's agent, "by depositing the goods and taking this ticket, did so act as to assert to the defendants that he had looked at and read the ticket, and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms." One principal reason for this conclusion is as follows (2): "The defendants as a railway company are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but anyone wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this. It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants as reasonable men in believing that the person bringing the goods and paying the money as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket, and to induce them to receive the goods on those terms?"

It is obvious that, mutatis mutandis, every word of this would apply to the present case. The only remaining point in this case which requires notice is that Lord Blackburn observes: "I think as at present advised the proper direction to a jury in such a case as this would be that if they believed these undisputed facts they

(1) Law Rep. 2 H. L., Sc. 470. (2) 1 Q. B. D. at p. 533.

ought to find that the terms were binding on the plaintiff. This we need not decide, but where I am to act both as judge and juror," the Court had the power to draw inferences of fact, "I have no hesitation in so finding."

This case appears to us to be precisely in point in reference to the matter now before us, except as to the question whether the Common Serjeant ought to have directed a verdict for the defendant, as to which Lord Blackburn's expression of opinion is only a dictum. It is however necessary to refer to two other cases in order to show that they do not interfere with this view.

The first of these is *Parker* v. *South Eastern Ry. Co.* (1) which was decided in 1877. *Gabell* v. *South Eastern Ry. Co.* (2) was decided at the same time by the same judgment, the facts and directions given to the jury being identical in the two cases.

The facts in each case closely resembled those of *Harris* v. *Great Western Ry. Co.* (3) In each case a bag was left at a cloak-room, 2*d.* was paid and a ticket received, which had printed upon it the words "see back." On the back were conditions of which one was, "The company will not be responsible for any package exceeding the value of 10*l.*" Each plaintiff denied that he had read the words on the ticket or seen a printed notice to the same effect hung up in the cloak-room. In each case the judge asked the jury (1.) Did the plaintiff read or was he aware of the condition? (2.) Was the plaintiff under the circumstances under the obligation in the exercise of reasonable and proper caution, to read or make himself aware of the condition? In each case the jury answered both questions in the negative. In each a rule for a new trial or for judgment was refused by the Divisional Court, and in each the case came before the Court of Appeal. Of the three judges who heard the case, Mellish, L.J., held, that there had been a misdirection, because the jury had not been asked whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition. Baggallay, L.J., was of the same opinion, though he expressed it somewhat differently, but each of these learned judges appears to have been of opinion that the importance to be attached and the effect to be

(1) 2 C. P. D. 416. (2) 2 C. P. D. 416.

(3) 1 Q. B. D. 515.

1883

WATKINS v. RYMILL.

given to a document of this nature must depend upon the character of the particular contract which it is alleged to constitute. As extreme cases, Mellish, L.J., suggests on the one hand the case of a turnpike ticket which a person driving through the gate on paying the toll would naturally not read, and on the other hand that of a bill of lading on which a person shipping goods would be held liable, although he might swear that he had never read it and did not believe it to contain conditions as to the terms of the contract of carriage. Lord Bramwell, then Lord Justice, took a view much more decisively in favour of the defendants. The case he said was precisely the same as if the defendant's servants had in so many words asked the plaintiffs to read the tickets, in which case as he says the plaintiffs would have to take the consequences if they did not read. "Why is there printing on the paper," he said, "except that it may be read?" The putting of it into their hands was equivalent to saying, "Read that." "Could the defendants practically do more than they did." He sums up his judgment thus. "The defendants put into the hands of the plaintiff a paper with printed matter on it which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the plaintiff sees and must either read it and object to it if he does not agree to it, or if he does read it and not object or does not read it, he must be held to consent to it."

Lord Bramwell would upon these grounds have given judgment for the defendants, but he agreed that there ought at least to be a new trial. If the judgment of Lord Bramwell in *Parker* v. *South Eastern Ry. Co.* (1) is accepted it appears to us to be an authority directly in point in favour of the defendants in the present case, but the other two judges took a somewhat different view of the subject, and Mellish, L.J., suggested the question which he considered proper for the jury. This question differs considerably from the one actually put by the Common Serjeant in this case. It is one thing to ask whether a defendant has done what is reasonably sufficient to give the plaintiff notice of a condition, and quite another to ask (as the Common Serjeant did) whether he has given him reasonable notice.

(1) 2 C. P. D. 416.

The latest case on the subject, and the last which we need notice, is *Burke* v. *South Eastern Ry. Co.* (1), decided in 1879. In this case the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was "Cheap return ticket London to Paris and back, second class," and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition and did not know of it. Cockburn, C.J., asked the jury the question suggested in *Parker* v. *South Eastern Ry. Co.* (2), and they answered it in favour of the plaintiff. The defendants moved to have judgment entered for them and this was done, the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this case can hardly be supported by any principle short of that laid down in *Zunz* v. *South Eastern Ry. Co.* (3), if indeed it does not go further.

Such being the state of the authorities, the question is how they bear on the case now to be decided. In a few words the matter appears to us to stand thus.

The cases relevant to the matter are in order of date: *Zunz* v. *South Eastern Ry. Co.* (3); *Harris* v. *Great Western Ry. Co.* (4); *Parker* v. *South Eastern Ry. Co.* (2); and *Burke* v. *South Eastern Ry. Co.* (1) All of them are in favour of the defendant except *Parker* v. *South Eastern Ry. Co.* (2), and of the three judgments in this case that of Lord Bramwell is directly in the defendants' favour. To a certain extent the judgments of Mellish and Baggallay, L.JJ., are in favour of the plaintiff, as they treat the question whether reasonable means to give notice were employed by the defendants as one of fact for the jury, though in another way they are unfavourable as they suggest as the question for the jury one which in this case was not put to them. It must be remembered that the precise question before the Court in *Parker* v. *South Eastern Ry. Co.* (2) was not whether the question in that case was one of law or of fact, but whether the questions put to the jury

(1) 5 C. P. D. 1.
(2) 2 C. P. D. 416.
(3) Law Rep. 4 Q. B. 539.
(4) 1 Q. B. D. 515.

1883

WATKINS v. RYMILL.

by the learned judges at Nisi Prius were proper, which, as all the Court agreed, they were not.

It must also be observed that in *Parker* v. *South Eastern Ry. Co.* (1) the question before the Court related to the common law contract of the bailment of goods for safe custody, the nature of which is well known in the absence of special terms agreed to by the parties. The present case relates to a contract of a different kind, namely, the deposit of an article for sale on commission, as to which the terms must necessarily depend upon the agreement of the parties, as none are ascertained by the common law. Besides all the judges in *Parker* v. *South Eastern Ry. Co.* (1) agreed that the effect of the delivery of a document stating terms must depend on the nature of the contract to which it related.

We now proceed to state the principles which we deduce from this examination of the authorities and to apply them to the case before us. Thrown into a general form the result of the authorities considered appears to be as follows. 'A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule however there are a variety of exceptions.

(1.) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special terms. Some illustrations of this exception may be found in the judgments in *Parker* v. *South Eastern Ry. Co.* (1), and in the language of some of the Lords in *Henderson* v. *Stevenson* (2), though these must be received with caution for reasons

(1) 2 C. P. D. 416. (2) Law Rep. 2 H. L., Sc. 470.

given by Lord Blackburn in his judgment in *Harris* v. *Great Western Ry. Co.* (1)

(2.) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document.

(3.) A third exception occurs, if, without being fraudulent, the document is misleading and does actually mislead the person who has taken it. The case of *Henderson* v. *Stevenson* (2) is an illustration of this.

(4.) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgment in *Parker* v. *South Eastern Ry. Co.* (3) One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case.

We now come to apply these principles to the case before us. It is obviously within the general rule. Can it be brought under any of the exceptions? The only one which can apply to it is the one which we have put first. Can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgement of an agreement not intended to be varied by special terms.

It seems to us impossible to suppose that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the common law in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract of lease or a bill of lading, and this consideration alone seems to us to establish the conclusion that the receipt and conditions to which it refers constituted the contract between the parties, and that the learned Common Serjeant misdirected the jury when he told them that the question was whether the

(1) 1 Q. B. D. 515. (2) Law Rep. 2 H. L., Sc. 470.
(3) 2 C. P. D. 416.

1883

WATKINS v. RYMILL.

defendant had given reasonable notice to the plaintiff of the conditions. We may observe that in no view of the case could this direction be upheld. If any question at all were asked it ought to have been whether the defendant took reasonable means to give notice of the conditions to the plaintiff, which is a very different one from that which was actually put to the jury.

This brings us to the last question in the case. Ought we to enter a verdict for the defendant or to send the case back for a new trial in order that the question suggested by Mellish, L.J., may be put? We think that we ought to enter judgment for the defendant. The question suggested by Mellish, L.J., may be proper in cases falling under what we have called the first exception to what we apprehend to be the general rule, but this, in our judgment, is not one of those cases. It resembles rather the cases of *Zunz* v. *South Eastern Ry. Co.* (1) and *Burke* v. *South Eastern Ry Co.* (2), in which the ticket itself was held to be the contract. It is in some cases difficult to say what is a question of law and what is a question of fact, but in this case a test may be applied which to us seems conclusive. Suppose that the case were sent for a new trial and that the jury, on the undisputed facts, were to find that the defendant had not taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being in direct opposition to the evidence? as being a verdict which, upon the evidence, no intelligent men could justly return? We think it would, and that being so, it seems to follow that the question is one of law and not of fact. It is, in one sense, a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law. This may be shewn by stating it specifically. The only question which can be called a question of fact is, whether giving a man a printed paper plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission is or is not equivalent to asking the owner of the carriage to read that paper, with intent that he should read it when he has a fair opportunity of doing so. This, we think, is a question of law, to be answered in the affirmative.

(1) Law Rep. 4 Q. B. 539. (2) 5 C. P. D. 1.

1883

WATKINS v. RYMILL.

As the result, the verdict and judgment for the plaintiff for 21*l.* will be set aside, and the verdict entered for the defendant, with costs.

Judgment for the defendant.

Solicitor for plaintiff: *L. W. Gregory.*
Solicitors for defendant: *Keene, Marsland, & Bryden.*

A. P. S.

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ined and distinguished. BROOKS ESCOTT. [1948] 1 All E.R. 907.

[IN THE COURT OF APPEAL.]

1882
Nov. 22.

THE ATTORNEY GENERAL *v.* EMERSON AND ANOTHER.

Practice—Production of Documents — Power of the Court to disregard the Affidavit as to the nature and effect of the Documents.

11 QBD 59

Although a defendant to an action swears that certain documents, which are in his possession and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plaintiff's case or impeach the defence, the Court will not act on such oath (at least in proceedings excepted by Order LXII. from the rules under the Judicature Act, 1875), but will order such documents to be produced, if, from the whole of the defendant's answer or from the description of the documents given by the defendant, the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents.

INFORMATION on behalf of the Crown in which it was prayed that it might be declared that Her Majesty the Queen, in right of her Crown, was seized in her desmesne as of fee of the foreshore of the sea opposite to the county of Essex, north and east of Havengore Creek, and that the defendants might be restrained from disturbing Her Majesty or her officers in the possession of the said premises, and also that if necessary a commission might issue to ascertain the boundaries seaward of the manors of Great Wakering and Little Wakering respectively. The defendant Emerson, in his answer to such information, and to the interrogatories which were administered to him, claimed as lord of the manors the whole of the foreshore, which was the subject-matter of the information as being within part of the manors. In answer to one of the interrogatories the defendant Emerson set out a statement made at the commencement of the present century by his predecessor in title, Sir John Tyrell, then Mr. Tyrell,

1882

ATTORNEY GENERAL v. EMERSON.

on the occasion of a dispute between him and Lord Winchelsea, then lord of the manor of Foulness, with reference to the boundaries of their respective manors. Such statement contained references to the court rolls, and at its end there was the following: "The foregoing are stated as evidence of the rights of the lord of the manor of Wakering within certain limits of Foulness, and as to those parts it is contended on the part of Mr. Tyrell that he is entitled to such wreckage as happens within these limits. To define the exact boundaries in this statement is not attempted, as this can only be done by taking observations from the points above described as bearing upon the objects referred to in the court rolls. . . . ." "The following is the description of the boundaries of the fisheries called Lee Sands and South Croft, which is stated to shew the manner in which the extent is ascertained. Lee Sands—The eastern boundary is the New House or Brickhouse farm, held by Mr. Meadins, and Rayleigh church, shut in with each other. The southern boundary is New Wick farmhouse, held by Mr. Wiggins, shut in with Southminster church. South Croft—The north east boundary is East Shelford farmhouse, held by Mr. Meadins, shut in with Canewden church. The south boundary is Sharpness Wall, shut in with New England House."

The defendant Emerson annexed a schedule to his answer, which was divided into four parts. The first part set out a list of documents commencing with a copy translation of the grant of the manors of Great and Little Wakering in 1613 by James I., and comprising, inter alia, a reference to bundles of the court rolls of the manor of Great Wakering, commencing in 1497 and ending December, 1814, and of the manor of Little Wakering, commencing in 1520 and ending in January, 1846. The second part set out, inter alia, documents numbered 169 to 177, being a list of books containing court rolls of the manor of Great Wakering, commencing May, 1815, and of the manor of Little Wakering, commencing November, 1848, and of minute books and statements as to rentals of such manors. The third part set out a list of letters and documents which were of a privileged nature, and the fourth part set out a list of documents which were no longer in the possession of the defendant. With reference to such

schedule the defendant Emerson, in paragraph 26 of his answer, stated, inter alia, as follows: "I have in the schedule hereto set forth to the best of my knowledge, information, and belief a full and true list of all such deeds, charters, inquisitions, court rolls, perambulations, maps, plans, books, papers, and writings relating to the matters in question in this suit or connected with, or mentioning, referring, or relating to the said matters, or whereby the truth of the matters hereinbefore stated or admitted will appear as have ever been in my possession, custody, or power, or in the possession, custody, or power of any solicitors or solicitor, agents or agent of mine." "I object to produce such of the same several documents as are set forth in the second part of the said schedule on the ground that the same relate exclusively to my own title to the said foreshore claimed by me, and that none of such last-mentioned documents relates to, or tends to support, or make evident, the alleged title of Her Majesty, or of any of her predecessors, kings and queens of England, to such foreshore."

Denman, J., at chambers, made an order that the defendant Emerson should produce for inspection the documents numbered 169 to 177 in the second part of the schedule.

The defendant Emerson appealed against this order to the Queen's Bench Division, which made an order dismissing such appeal, and from this last order he appealed.

Moulton and *J. Ashton*, for the defendant Emerson. The documents which the defendant Emerson has been ordered to produce relate exclusively to his own title, and are therefore privileged. The affidavit which by agreement was treated in the Court below and is here to be treated as amended in its terms, according to the language of the affidavit used in *Bewicke* v. *Graham* (1), is, as was decided by that authority, conclusive against the party seeking inspection. As the affidavit therefore conclusively proves that the documents do not in any way tend to make out the case of such party, it displaces the right which according to *Jenkins* v. *Bushby* (2) such party might otherwise have to discovery. *Benbow* v. *Low* (3) is also an authority for the defendant Emerson

(1) 7 Q. B. D. 400. (2) 35 L. J. (Ch.) 400. (3) 16 Ch. D. 93.

1882

ATTORNEY GENERAL v. EMERSON.

objecting to produce for inspection what relates only to such defendant's evidence. The Court below affirmed the order for the production of the documents on the authority of *Earp* v. *Lloyd.* (1) It may be admitted that that case cannot be distinguished from the present one, but it was wrongly decided, and is not binding on this Court. It was decided by Lord Hatherley, then Vice-Chancellor Page Wood, expressly on the authority of *Burrell* v. *Nicholson* (2) and *Smith* v. *Duke of Beaufort* (3), but neither of those cases support that decision, as in neither of them was it sworn by the defendant that the documents which were ordered to be produced related exclusively to his case, and did not tend to make out the plaintiff's case. *Owen* v. *Wynn* (4) supports the defendant's contention. There the plaintiffs, who claimed adversely to a manor of which the defendant was the lord, were held not to be entitled to the inspection of the court rolls.

V. Hawkins (*Sir H. James, A.G.*, with him), for the informant. The question in dispute is one of boundary, and the documents which are sought to be inspected contain evidence which is really common to both parties. It appears from their description that they may probably relate to the case of the informant, and therefore it is no ground for refusing to produce them to say generally as the defendant does that they relate only to his case. The rule as to discovery and production is thus very clearly stated by Knight-Bruce, V.C., in *Combe* v. *Corporation of London* (5): "If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected; nor, I appre-

(1) 3 K. & J. 549.
(2) 1 My. & K. 680.
(3) 1 Hare, 507; on appeal, 1 Ph. 209
(4) 9 Ch. D. 29.
(5) 1 Y. & C. 631, at p. 651.

hend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness." This was followed by *Ferrier* v. *Atwool* (1), where, in a suit for partnership accounts in which the dispute was whether there was a partnership at all, the Lord Justices refused to act on the defendant's answer that the documents sought to be produced, which included the accounts kept by him of the business, related exclusively to his own business, "the very nature of the dispute between the parties," said Knight-Bruce, L.J., "renders it impossible to bind the plaintiff by the defendant's view of the nature of these documents and the extent to which they may be put." So Wigram, V.C., in *Attorney-General* v. *Thompson* (2), speaking of the interest the plaintiff must have in the document of which he seeks the production, says, "it must be shewn that the document is of a character that it will or may give a discovery of the case, or a portion of the case, without proof of which the plaintiff cannot have a decree." Lord Lyndhurst considered that if the documents relate to the matters in question it is not sufficient to say that they will not assist the plaintiff's case, as that must be matter of opinion: *Newton* v. *Berresford.* (3) It must be observed that there was a difference in practice in Courts of Equity and of Common Law in granting discovery and production of documents, and that the Common Law Courts under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), exercised in that respect a more limited jurisdiction than the equity courts did: *Newall* v. *Telegraph Construction Co.* (4); *Catt* v. *Tourle.* (5) The present case is in a proceeding by information on the revenue side, and is excepted by Order LXII. from the rules under the Judicature Act, 1875, and is therefore not governed by those rules. The question therefore is whether independently of them the answer of the defendant is binding on the plaintiff so as to preclude him from his right to production. The cases of *Felkin* v. *Lord Herbert* (6); *Prince of Wales* v. *Lambe* (7); *Knight* v. *Marquis of Waterford* (8); *Jenkins* v. *Bushby* (9); *Gresley* v.

(1) 12 Jur. (N.S.) 365.
(2) 8 Hare, 106, at p. 112.
(3) 1 Younge, Ex. 377, at p. 381.
(4) Law Rep. 2 Eq. 756, at p. 762.
(5) 18 W. R. 966.
(6) 30 L. J. (Ch.) 798.
(7) 11 Beav. 213.
(8) 2 Y. & C. Ex. 22.
(9) 35 L. J. (Ch.) 400.

1882

ATTORNEY GENERAL v. EMERSON.

Mousley (1); *Mansell* v. *Feeney* (2); *Lind* v. *Isle of Wight Ferry Co.* (3); and *Harris* v. *Harris* (4), shew that the equity courts have looked at the nature and description of the documents and have ordered their production where they considered they might contain matter material to the plaintiff's case, notwithstanding any statement in the answer of the defendant to the contrary. The effect of the decision in *Earp* v. *Lloyd* (5) was that in that case, where the question was one of boundary, the deeds, which it was assumed contained parcels relating to the locus in quo, must reasonably be material for either of the parties and therefore ought to be produced. That was rightly decided, and supports the contention of the informant in the present case. *Owen* v. *Wynn* (6) was a very different one; it was not one of boundary, and it manifestly appeared that the plaintiff could have no interest in the court rolls. With regard to the case of *Bewicke* v. *Graham* (7) there the only description of the documents was that of their being numbered and tied up in a bundle marked sufficiently for the purpose of identification, and the Court could not therefore see from the description and nature of the documents that the affidavit was erroneous. Here, on the contrary, on looking at the information and answer and the documents as there described, it obviously appears that the documents do, or at least may reasonably be supposed to, relate to the case of the Crown.

Moulton, in reply. No doubt the answer must be looked at as a whole, and if from the whole of it the Court can be satisfied that the documents tend to make out the case of the party seeking their production, the Court it must be admitted will order such production, notwithstanding that there may be averments in the answer that the documents will not have such effect. Here there cannot be any entry in the court rolls which can tend to make out the case of the Crown. The Crown can have no title under them, and they relating as they do to the defendant's title must tend to negative the title of the Crown: *Bolton* v. *Corporation of Liverpool* (8); *Minet* v. *Morgan*. (9)

(1) 2 K. & J. 288.
(2) 2 J. & H. 320.
(3) 8 W. R. 540.
(4) 4 Hare, 179.
(5) 3 K. & J 549.
(6) 9 Ch. D. 29.
(7) 7 Q. B. D. 400.
(8) 1 My. & K. 88; 1 L. J. (Ch.) 166.
(9) Law Rep. 8 Ch. 361.

1882

ATTORNEY GENERAL v. EMERSON.

BAGGALLAY, L.J. In this case the Attorney-General on behalf of Her Majesty filed an information against the defendant Emerson in which there was this prayer. [The Lord Justice read the prayer.] An answer was put in to that information, and I will here observe that by Order LXII. of the Rules of Court under the Judicature Act, 1875, those rules are not to affect the practice or procedure in Crown or revenue cases, and therefore are not applicable to the particular jurisdiction sought to be enforced in this present case. Consequently the old system whatever it was prevails so far as regards the question now under consideration.

In the answer which was put in the defendant Emerson says as follows:—[The Lord Justice here read paragraph 26 of the answer.] Therefore he starts by saying that the deeds, court rolls, and documents which he has set forth in the schedule are documents which relate to the matters in dispute between the parties, which is a very important admission on his part. The schedule is divided into four parts, the second of which contains a list of documents which he objects to produce on the ground that they relate exclusively to his own title to the foreshore, and do not relate to or tend to support the title of the Crown to such foreshore. Now the protection against production was stated by Knight-Bruce, L.J., then Vice-Chancellor, in *Combe* v. *Corporation of London* (1), in larger terms than it is in this 26th paragraph of the answer, but it has been agreed between the parties that the opinion of this Court shall be taken on the question in this case, as if all that was considered necessary for that purpose by Knight-Bruce, L.J., in *Combe* v. *Corporation of London* (1) were stated in the defendant's answer as the ground for the non-production of that document.

Now what was so laid down by Knight-Bruce, L.J., in *Combe* v. *Corporation of London* (1) has been cited in all text-books, as far as I know, as enunciating the rule applicable to the circumstances under which the production of documents in the possession of a party can be refused. Knight-Bruce, L.J., there says this: "If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is

(1) 1 Y. & C. at p. 651.

1882

ATTORNEY GENERAL v. EMERSON.

Baggallay, L.J.

intended to be, or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature." Pausing here for one moment it will be observed that there are four allegations which, in the view of that learned judge, were important in order to maintain the claim to protection, namely, first, that the document supports the defendants' title; secondly, that it is intended to be, or may be, used by him in evidence accordingly; thirdly, that it does not contain anything impeaching his defence; or, fourthly, forming or supporting the plaintiff's title or the plaintiff's case. Then he says, if these four sets of circumstances co-exist, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature, that document is protected from production. Now it has been suggested that there might be some doubt as regards the precise meaning to be attached to the word "sees" in that passage. I should be disposed myself to say, if that sort of judicial view that a person would take of all the circumstances brought under his notice in connection with the particular case were considered by him, it might perhaps be said that the word "see" is equivalent to "reasonably satisfied" or "reasonably certain," that is to say, that it possesses that amount of certainty that a reasonable man would act upon it as a certainty. I must confess that there does not appear to me to be any very substantial difference between these several views, and I think that applying one or other of those interpretations of the word "sees," in the great majority of cases it would lead to the same result. But then Knight-Bruce, L.J., goes on to say, "But where it is consistent with the answer that the document may form the plaintiff's title or the plaintiff's case, or may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness." Now I do not think it was the intention of that

learned judge in that second proposition to affirm anything different from that which he had affirmed in the earlier proposition, but merely to put, as it were, the converse case. In the one he says this rule shall apply unless the judge sees something to the contrary, and, in the second, he says that where it is consistent with the answer which the defendant has put in, that these other circumstances may exist, then there is no protection. I think they substantially mean the same thing. Adopting the rule which is so stated as a guide, if a judge finds an answer in such precise terms as Knight-Bruce, L.J., has there pointed out (and which we are to assume the answer in the present case amounts to), it becomes then his duty to ascertain whether, from a consideration of the whole case, he is satisfied that the defendant has erroneously represented or misconceived the nature of his case. I certainly do not depart at all from that which has been repeatedly acted upon, namely, that where you have nothing but the clear and positive denial of the defendant in terms equivalent to those so enunciated by Knight-Bruce, L.J., in *Combe* v. *Corporation of London* (1), you must accept his oath and give credit to it. But here there is the circumstance which I think cannot be omitted from consideration, namely, the admission by the defendant that the documents which he seeks to protect, as well as those which he does not seek to protect, relate to the subject-matter of the suit. That raises, as I think, a sort of doubt, though not at all sufficient to be acted upon by itself, whether these documents, which are sought to be protected, have not a bearing which would make one or other of the several allegations not strictly accurate. I do not think that a mere inference of that kind would be sufficient, but when there is, as in this case, not only the statement with regard to the possession of the documents and the denials which are necessary for the claim of protection, but also the language of a continuous answer to various other interrogatories in connection with the subject-matter of the suit, then it is to be considered whether, taking all the admissions and the whole of the answer in connection with the subject-matter to which they relate, full and complete credit can be given to the oath of the defendant. I do not for one moment mean by that

(1) 1 Y. & C. at p. 651.

1882

ATTORNEY GENERAL v. EMERSON.

Baggallay, L.J.

that the defendant has wilfully stated that which is false. It may very well be that the case is, as here, a complicated one of title, and a man may very readily believe, especially if he is not a professional man, that particular documents, according to his view, in no way support the plaintiff's title, and in no way impeach his own title. Therefore it is, when one comes to look at the other portions of the answer, that one must form the opinion whether it is right to give unbounded credit to the representation which the defendant has made. Now I do not profess to travel all through the allegations and statements which are to be found in the defendant's answer in the present case, but I am bound to say that it appears to me impossible to come to any other conclusion than that he has made some mistake or misconceived the effect of the documents which he has said have no relation whatever to support the plaintiff's case or in any way to impeach his own. He has set forth a number of court rolls down to fifty or sixty years ago, but all the more recent ones are those which he asks not to be compelled to produce. Now with regard to the very peculiar nature of copyhold property and what is often found on copyhold rolls, there is a very strong presumption that if there has been for a long series of years entries of admissions from time to time to copyhold property, the continuance of those rolls down to the present time would contain some matters of importance to the several parcels of the land, or have reference to certain acts, or rights, or privileges, connected with ownership, or to the absence of information with regard to particular parcels of the manor, which might be very important as indicating that certain land was not a parcel of the manor, notwithstanding the earlier court rolls had regularly dealt with it. Mr. Vaughan Hawkins directed our attention to certain entries in the defendant's answer which render it almost impossible to come to the conclusion that the later court rolls do not contain matters of importance, not only as affecting the matter in dispute, but as tending either to shew the plaintiff's title, or possibly to impeach the title of the defendant. I refer to the statement of Mr. Tyrell set out in the defendant's answer, where, after a series of entries from the court rolls, there is the following: "The foregoing are stated as evidence of the rights of the lord of the manor of Wakering, within certain limits of

1882

ATTORNEY GENERAL v. EMERSON.

Baggallay, L.J.

Foulness, and as to those parts, it is contended on the part of Mr. Tyrell that he is entitled to such wreckage as happens within these limits." Then he says that "to define the exact boundaries is not attempted," and a little farther on he proceeds to say: "The following is the description of the boundaries of the fisheries called Lee Sands and South Croft, which is stated to shew the manner in which the extent is ascertained. Lee Sands,—the eastern boundary is the New House, or Brick House farm, held by Mr. Meadins, and Rayleigh church, shut in with each other." It is everything, if you want to ascertain the boundary, to know the exact position of Brick House farm, which was held by Mr. Meadins. So as to the farm-house held by a particular tenant, the subsequent court rolls would in all probability give some information. Applying the test suggested by Knight-Bruce, L.J., I am "reasonably satisfied," or am "reasonably certain," that the defendant Emerson has misrepresented or has misconceived the nature of the documents when he says they cannot have the effect which he says they have not. I think the decision of the learned judges in the Court below was quite right, and that the appeal must be dismissed.

BRETT, L.J. The process into which we are inquiring consists of several successive steps, and it is necessary, in my opinion, to separate and consider carefully which step it is into which we are now inquiring.

The first step in this process consists of interrogatories put to a party who I will take, for example, to be a defendant, as to the existence of documents. Those interrogatories the defendant is bound to answer by describing what documents are in his possession or under his control which refer or relate to the matters in dispute. Now the answer given by the defendant to those interrogatories may be in a more or less general form; it may contain a certain description of the different documents, or, as in the case of *Bewicke* v. *Graham* (1), it may contain a less certain description of them, as, for instance, by stating that the defendant has in his possession or control a certain number of documents in bundles, numbered with the numbers there specified. Now if the person

(1) 7 Q. B. D. 400.

1882

ATTORNEY GENERAL v. EMERSON.

Brett, L.J.

interrogating, that is, the plaintiff in the case supposed, is not satisfied with the particularity of the description of the documents, he has a remedy, for he may ask leave of the Court either to further interrogate or to require more accurate description of the documents. If the plaintiff does not object to the description of the documents given in the answer, it seems to me that in the next stage, which is the one we have now to consider, he is precluded from asking for any further description of the documents. This case must, therefore, now be considered with regard to the description which has been given, and to which no objection has been made.

After the defendant has answered the interrogatories a new stage of the process is commenced, and as regards the documents which the defendant has described, and which he has stated are in his possession or control and refer to the matters in dispute, the plaintiff has a right to ask for their discovery, and unless the defendant can shew a valid objection to their production all of them must be produced. Now if the defendant desires to object to the production of any of them he must make an affidavit with regard to those which he objects to produce, and such affidavit, as it seems to me, must be of a very strict kind. When he has made that affidavit, a question will arise whether it is so strict in substance as to entitle him even primâ facie to object to the production of the documents. The affidavit, ever since the case of *Combe* v. *Corporation of London* (1) must, to the extent there described with great care by Knight-Bruce, L.J., state with distinctness and positiveness that the documents form or support the defendant's title or case, and are intended to be, or may be, used by him in supporting it, and do not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case. It is not sufficient for the affidavit to state that the documents form part of the defendant's title or case, and that they do not contain anything impeaching the defendant's title or case, but it must also go on to state that they do not form or support in any way the plaintiff's title or the plaintiff's case.

Now there are reported cases in which the defendant has been forced to produce documents which he has already stated refer to

(1) 1 Y. & C. at p. 651.

the matters in dispute because his affidavit in answer to the application to produce those documents has not been sufficient within that rule. In the present case, however, it is to be assumed by agreement between the parties that the affidavit states all the matters required by that rule in answer to the application to produce, and therefore is primâ facie sufficient. But then comes another question which has been a matter of considerable controversy, and that is, assuming the defendant has made an affidavit in such a form as is primâ facie sufficient to protect the documents from production, is a judge bound absolutely to accept it and to act upon it? It has been held, certainly since the case of *Combe* v. *Corporation of London* (1), that a judge is not absolutely bound to accept the affidavit, although it is primâ facie full in form. But then the doubt has arisen as to what circumstances will entitle a judge not absolutely to disregard but to decline to act upon such affidavit. I think that in stating what is the extent of circumstances which will entitle a judge not to act upon the affidavit of the defendant in such a case, the judges have differed in the form of expression of that rule, and yet it seems to me to be very important that the rule should be so expressed that every judge should be able to act upon it. The judge who has stated the rule in the widest terms which will enable a judge not to act upon the affidavit of the defendant was the late Lord Hatherley, when he was Vice-Chancellor Page Wood, in *Newall* v. *Telegraph Construction Co.* (2), but with the greatest deference I cannot myself think that he laid down the rule in any exact terms at all. Knight-Bruce, L.J., undertook, I think, in *Combe* v. *Corporation of London* (1), to lay down that which was to be the rule which all judges were to apply. And I think that, subject to the alteration, or rather to the explanation of one word, the rule there laid down by him is the right one. What he there states is this: "If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production unless the

(1) 1 Y. & C. at p. 651. (2) Law Rep. 2 Eq. 756.

1882

ATTORNEY GENERAL v. EMERSON.

Brett, L.J.

Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature." I think that what that learned judge meant there by "its nature" was whether the nature of the document was such that it formed or supported the defendant's title, and did not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case; and that that was the nature as to which it must be seen by the Court whether there is any error by the defendant. As regards the next part, "unless the Court sees," I think that is right if one can come to an accurate conclusion as to what is the meaning of the word "sees" in that sentence. My interpretation of those words, "unless the Court sees," is unless the Court is satisfied, that is to say, is reasonably certain, by which I mean, has that degree of certainty on which a man of reasonable care would, under the circumstances, act as a certainty. If the Court then has that degree of certainty that the defendant has not erroneously represented or misconceived the nature of the documents, in saying that they only can form part of his case and cannot form any part of the plaintiff's case, the Court must act upon the affidavit. But if, on the other hand, the Court has that degree of certainty that the defendant has in that sense misconceived the nature of the documents, then the Court is entitled not to act upon the affidavit. But from what is the Court to get this certainty? Where the proceeding was that of the old Court of Chancery, I suppose it was from the answer; but where it is the new process, that is, where it is only by interrogatories, summons, and affidavits, it seems to me that that certainty must be got from the description of the documents given by the defendant and from other admissions and documents produced to the Court. If from these the Court can see, with that certainty which I have before described, that the defendant cannot be trusted when he swears in the form which has been described, then the Court will not give effect to the defendant's oath as to the nature and effect of the documents, but will act upon its own view as to them.

Where therefore from the nature and description of the documents the Court feels certain in the sense that I have described that the documents will assist the plaintiff's case, or will negative

the defendant's case, of course then they will not act upon the affidavit, and I desire to say distinctly that if the nature of the documents is such that the Court can say with certainty that no person in the position of the defendant can properly negative the parts which he does negative or affirm the parts which he does affirm, then the Court cannot accept his affidavit as satisfactory. But unless the Court is, in the manner described and to the extent described, certain that the document is of such a character that the defendant cannot properly swear to the effect to which he is bound to swear in order to claim protection, then the Court must trust the oath of the defendant and refuse the order for production.

The rule which we are laying down is, no doubt, the rule which was applicable to the former proceedings in the Court of Chancery, but it seems to me that it is equally applicable to the affidavit which claims protection from the production of documents under the orders and rules of the Judicature Act. Then comes the question how to apply this rule to the case before us, and I confess that I have had some difficulty about it. If the court rolls are put in I think it is true to say in one sense that the entries of admission of persons in the court rolls cannot assist the case of the Crown or negative the defendant's case. They must assist the defendant's case as to what the manor is. But then I feel this that in a question of boundary the existence of entries of admission to a certain extent, and the absence of any admissions beyond that extent, would on the whole of the court rolls negative, or tend to negative, the defendant's case, and therefore I am not prepared to disagree from the conclusion to which the learned judge at chambers came. I think the case is within the rule, and that therefore the decision of the Divisional Court must be affirmed.

LINDLEY, L.J. I am of the same opinion, and after the very exhaustive manner in which the rule as laid down by Lord Justice Knight-Bruce, then Vice-Chancellor, in *Combe* v. *Corporation of London* (1) has been referred to and paraphrased I shall make very few observations. To my mind I do not see much distinction

(1) 1 Y. & C. 651.

1882

ATTORNEY GENERAL v. EMERSON.

Lindley, L.J.

between saying "the Court sees" or "the Court is satisfied," or "the Court is reasonably satisfied." They strike me as substantially equivalent expressions and ought to be accepted as such. Now, what we have got to do practically is to see whether there are sufficient materials before us for distrusting the defendant when he swears that certain documents which are relevant to the matters in question in the cause do not assist the plaintiff. Now, I must say that as soon as I read the pleadings and appreciated the point and saw what the old court rolls were, it appeared to me that the case was free from difficulty. It is, I think, impossible for the defendant or anybody else to say that these court rolls cannot assist the plaintiff. On the contrary, the probability is almost certain that they must assist the plaintiff in this way; the real question in dispute is where are the boundaries of those manors towards the sea north or east of this Havengore Creek. Nobody knows where the boundaries are, except so far as they can be got at by the court rolls, and of course a map. The defendant evidently does not know, and that strikes me as telling very much against him, because then you distrust him when he says that that cannot appear by the court rolls. What does appear is this, the court rolls contain statements of admissions to certain parcels of land described in a way which is very frequently the practice and identified by linking them together and with a map. We are entitled to assume that the court rolls sought to be protected contain entries of admissions, which as in all court rolls throughout the country are more or less connected by previous descriptions. Therefore we know almost to a certainty that if you can get all these court rolls in a string together you will be able, by perhaps a tedious process, to ascertain where the particular spots mentioned in the court rolls are, and with very considerable accuracy where the boundary is. That being the inference I draw from what one knows of court rolls, it is obvious that neither this nor any other Court can hesitate to say that this affidavit of the defendant (even assuming it to be sworn up to the mark, which it is not) should be distrusted. Under these circumstances the Court sees, or is satisfied, or is reasonably certain, that the defendant has erroneously represented or misconceived the nature of the documents as to which he is swearing.

1882

ATTORNEY GENERAL v. EMERSON.

It appears to me that the case is free from all reasonable doubt, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for informant: *The Solicitor to the Commissioners of Her Majesty's Woods, Forests, and Land Revenues.*

Solicitor for defendant *Emerson: Goodhart & Medcalf.*

W. P.

[IN THE COURT OF APPEAL.]

Dec. 19.

IN RE BLYTH & FANSHAWE.

EX PARTE WELLS.

Practice—Costs—Shorthand Notes—Solicitor and Client—Taxation.

Where a solicitor proposes to incur unusual expense in the course of an action, such as taking shorthand notes of the evidence or procuring the attendance of experts and scientific witnesses, it is his duty to point out to his client that such expense might not be allowed on taxation as between party and party, and might therefore have to be borne by the client whatever might be the result of the trial. Therefore where the solicitor had omitted such duty, he was not allowed on taxation as between solicitor and client the costs of shorthand notes of the evidence, although the client authorized him to employ a shorthand writer to take such notes and used and otherwise availed himself of them after they had been so taken.

APPEAL of Messrs. Blyth & Fanshawe, solicitors, from an order of Lord Coleridge, C.J., refusing to order the master to review his taxation of their bill of costs which had been taxed by him as between solicitor and client at the instance of their former client Mr. Edwin Wells.

The action in respect of which the costs were incurred was brought by Mr. Wells against the Mitcham Gaslight Company to recover 1596*l.* 14*s.* 3*d.* as the balance due to him on a building contract. The defendants in that action set up a counterclaim for 5622*l.*, and the action was referred to a barrister, who after numerous sittings, made an award in favour of the plaintiff for 518*l.*, and ordered the defendants to pay the costs of the reference. One counsel only (a Queen's counsel) was engaged on the reference on behalf of the plaintiff, but a shorthand writer was retained,

1882

IN RE BLYTH & FANSHAWE.

who attended daily and took notes of the evidence. The charges for taking such notes, including costs of transcripts and of copies used in the reference exceeded 500*l*. None of these charges were allowed on the taxation of the costs as between party and party (see *Wells* v. *Mitcham Gaslight Co.* (1)), and upon the taxation as between solicitor and client, the subject of this appeal, they were also disallowed by the master, because although he was of opinion that Mr. Wells was aware that a shorthand writer was being employed he did not find that Mr. Wells otherwise authorized such employment, or that he was ever made aware that the expense would not be allowed as against the opposite party. Copies of the shorthand writer's notes were used throughout the reference both by the arbitrator, by the counsel who attended for Mr. Wells, and by Mr. Wells himself, and although the affidavits were conflicting on the subject, it must be taken here as the result of what was deposed, that Mr. Wells authorized his said solicitors to employ shorthand writers to take the notes which were taken on the reference, but that such solicitors never informed him that even if he succeeded he would have to bear the expense, as probably it would not be allowed on the taxation between party and party; objection was also made to the disallowance by the master of other charges, concerning which it is only necessary to say that they were the costs of scientific witnesses or experts, and that there was evidence that they had been employed with the approbation of Mr. Wells, and that he had been distinctly informed that all the expense of having them would not be allowed as against the opposite party but would have to be paid by him.

A. L. Smith (*E. Clarke, Q.C.*, with him), for the appellants. (2) The result of the affidavits is such as to justify the Court finding as a fact that Mr. Wells authorized the employment of a shorthand writer. There is abundant evidence, at all events, of knowledge on the part of Mr. Wells of such employment and of his having ratified it. Next, it is within the scope of a solicitor's authority to retain for his client whatever may be essential for

(1) 4 Ex. D. 1.

(2) The argument is confined to the costs of the shorthand notes, as that relating to the costs of the scientific witnesses is not required for this report.

1882

IN RE BLYTH & FANSHAWE.

the due prosecution of the cause of his client, and the employment of a shorthand writer in this case was so essential, especially for the assistance of the scientific witnesses and of Mr. Wells himself, as to come within such general authority of a solicitor. It is true that there is no reported case as to the allowance or not of the costs of shorthand notes on the taxation between solicitor and client. There have been such cases on party and party taxation, and no doubt those cases shew that such costs are not allowed as between party and party, unless there has been an order of the Court made in each particular action allowing the costs of such shorthand notes, but such is generally made where the shorthand notes have been essential to the proper hearing of the case: *Lee Conservancy Board* v. *Button* (1) and *Watson* v. *Great Western Ry. Co.* (2) There is a difference with regard to the principle upon which costs are taxed as between party and party and as between solicitor and client: Daniell's Chancery Practice, vol. 2, 5th ed., p. 1298. "In general," it is there said, "in taxations as between party and party only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation . . . while in taxations as between solicitor and client the party will be allowed as many of the charges which he would have been compelled to pay his own solicitor as being costs of suit as fair justice to the other party will permit."

Holl, Q.C., and *Fraser Macleod* (*H. Kisch*, with them), for the respondent. The costs of shorthand notes are not to be allowed on taxation unless an order has been obtained for that purpose: *Kelly* v. *Byles* (3); *Earl De La Warr* v. *Miles.* (4) In *Croomes* v. *Gore* (5) it was decided that the successful party on a reference is not entitled to the costs of a shorthand writer's notes of the evidence, although the attendance of a second counsel, or of an attorney's clerk to take notes, would be allowed. That case is very similar to that now before the Court, and its principle has been followed in the present case upon the taxation as between party and party: *Wells* v. *Mitcham Gaslight Co.* (6) At all events,

(1) 12 Ch. D. 383.
(2) 6 Q. B. D. 163.
(3) 13 Ch. D. 682.
(4) 19 Ch. D. 80.
(5) 1 H. & N. 14; 25 L. J. (Ex.) 267.
(6) 4 Ex. D. 1.

1882

IN RE BLYTH & FANSHAWE.

it was within the master's discretion whether the costs of the shorthand notes should be allowed, and this Court will not interfere with the exercise of that discretion except in extreme cases: *Marcus* v. *General Steam Navigation Co.* (1) The present question has never been raised in any previous case as between solicitor and client; but the same principle applies as between party and party. It would have been far less expensive to employ a junior counsel to take notes; here the shorthand notes cost about as much as the whole amount recovered in the action. But the Master did not decide simply on this ground, but also on the ground that it must have been foreseen that the shorthand notes would swallow up a large amount. *In re Snell* (2) shews that a solicitor must not incur unusual costs without special instructions from his client, and it appears from *In re Smith* (3) that before a solicitor can charge for unusual costs, his client must have been made aware that he could recover none of the costs from the opposite party.

A. L. Smith replied.

BAGGALLAY, L.J. [after stating fully the facts of the case, and how the matter came by way of appeal before the Court, proceeded as follows:—] I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that if an unusual expense is about to be incurred in the course of an action it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of the trial. Now in the application of this rule to the two classes of costs with which we have to deal here, the facts are different as to one from what they are as to the other. As regards the costs of the shorthand notes there is a conflict of testimony between the parties. [After giving reasons for his inability to give the same credit to the statement of Mr. Wells which he gave to the statements of Mr. Blyth and Mr. Fanshawe, the Lord Justice continued thus:]

(1) 35 L. T. (N.S.) 353. (2) 5 Ch. D. 815.
(3) 2 D. & L. 376.

Therefore I give credit to the evidence of Mr. Blyth, and believe that authority to employ a shorthand writer was given previously to his employment. There can be no question that after his employment there was a constant knowledge by Mr. Wells of what was going on, and that he availed himself of what had been done in the taking of the shorthand notes. Then, assuming as I do, that authority was obtained from Mr. Wells to employ a shorthand writer, was it explained to him by Mr. Fanshawe, or by anyone representing the firm of Blyth & Fanshawe, that whatever was the result of the action he would have to bear the whole of the costs of the shorthand writer, or at any rate a large proportion of it, himself. Mr. Wells, no doubt, has gone the length of saying that he was distinctly told by Mr. Fanshawe that if he won the other side would have to pay them. It is as distinctly denied by Mr. Fanshawe that he said anything of the kind, and for the reasons I have already explained, I give credit to Mr. Fanshawe's statement on this point, and not to the statement of Mr. Wells. But when Mr. Fanshawe denied that he told Mr. Wells that if he won the other side would have to pay, he would, I am sure, have stated, if he could, that he informed Mr. Wells to the contrary. Upon that he is perfectly silent, and therefore I must assume that no notice whatever was given to Mr. Wells that in any result of the case he would have probably to pay the whole or a large portion of the costs for taking shorthand notes. Consequently as far as regards that part of the case the view taken by Lord Coleridge was quite right, and there can be no opportunity of reviewing this part of the taxation.

I take a different view with regard to the expert evidence. (1) So far as regards the question of the employment of certain expert witnesses, I must, upon the evidence of Mr. Fanshawe, which is clear and distinct, and which is not contradicted by anything said by Mr. Wells, that we can rely upon, say that the full consent and approbation of Mr. Wells was obtained, he at that time being informed that the whole of the costs in respect of those witnesses would not be allowed on party and party taxation. It appears to

(1) The Lord Justice commented on the affidavits with regard to the employment and payment of the scientific witnesses, but all such part of his judgment has been omitted here as unnecessary for this report.

1882

IN RE BLYTH & FANSHAWE.

me, therefore, that so far as regards experts generally this part must go back for a renewed taxation.

LINDLEY, L.J. I am of the same opinion. The first question relates to the shorthand writer's notes. It was the duty of the solicitors to Mr. Wells to give him advice and protection against unnecessary expense, and to point out to him that if he chose to engage shorthand writers the cost of having the transcript of shorthand notes might not be allowed as between party and party. It appears to me that that was their bounden duty, and there is no proof that they discharged that duty. That short point was taken by the Master and also by Lord Coleridge, and it is impossible to allow the costs of having the shorthand notes, although I am perfectly satisfied Mr. Wells authorized their being taken, and knew all about them from the beginning, but he did not know, or at all events it is not proved that he did know, that if he succeeded in the action he would have to pay for them.

As regards the experts it appears to me that the evidence is entirely in favour of the solicitors. It appears to me that the burden of proof being upon them to shew that Mr. Wells knew he would have to pay or might have to pay these witnesses whatever the result of the trial, they have proved it.

I may add that it appears to me to be an entire mistake to suppose that charges can only be allowed between solicitor and client which can only be allowed as between party and party, and that that which is necessarily reasonable in one case must be the limit of what is reasonable in the other. Of course what is reasonable between party and party must be reasonable between solicitor and client, but the converse is not true. The result is that the matter should be referred back to the Master to review his taxation as to the moneys paid the experts.

Order accordingly. (1)

Solicitors for appellants: *Wilkins, Blyth, & Dutton.*
Solicitor for respondent: *Tinkler.*

(1) No costs on either side either in the Court of Appeal, or in the Court below.

W. P.

THE QUEEN *v.* KAY.

1882
Nov. 24.

Licensing Acts—Beerdealers Retail Licenses Act, 1882 (45 & 46 *Vict. c.* 34), *s.* 1 —"*Off*" *Licenses—Renewal—Discretion to refuse.*

The unqualified discretion which the licensing justices have under the Beerdealers' Retail Licenses Act, 1882 (45 & 46 Vict. c. 34), s. 1, to refuse a certificate for any license for sale of beer by retail to be consumed off the premises may be exercised, not only on an application for such certificate in respect of premises not theretofore similarly licensed, but also on an application for such certificate by way of renewal.

11 QBD 68, 71

RULE to quash an order of General Quarter Sessions of Preston, made subject to the following Case:

The appellant was the owner and occupier of a grocer's shop. Since 1875 he had been the holder in each year of a certificate authorizing him to apply for and hold a license for the sale by retail of beer not to be consumed on the said premises, in pursuance of the Acts 11 Geo. 4 and 1 Wm. 4, c. 64, and the Acts amending the same, and the last of such licenses was in force in September, 1882.

At the general annual licensing meeting held by adjournment for the borough of Over Darwen on the 14th of September, 1882 (which borough has upwards of ten justices acting in and for the same), an application of the appellant for a similar certificate in respect of the same shop came on to be finally heard and determined.

The justices refused the certificate on the ground that, having regard to the neighbourhood of the shop and its wants and requirements, it was not expedient that the certificate should be granted.

The appellant appealed to quarter sessions, and on the hearing of the appeal it was objected that the discretion given by the Beerdealers' Retail Licenses Amendment Act, 1882, is limited to applications for certificates in respect of new licenses, and does not extend to grants of certificates for the licensing of premises which had been similarly licensed prior to and at the passing of the Act.

The Court of Quarter Sessions overruled the objection, and

1882

THE QUEEN v. KAY.

after hearing evidence in support of the decision of the licensing justices as to the nature of the neighbourhood and its requirements, confirmed the decision, and dismissed the appeal with costs, subject to the opinion of the Queen's Bench Division as to the validity in law of the said objection.

The question for the opinion of the Court was: Is the discretion given by s. 1 of the Beerdealers' Retail Licenses Amendment Act, 1882, limited to applications for certificates in respect of premises not theretofore similarly licensed?

Addison, Q.C. (*Potter* and *Yarburgh*, with him), shewed cause. The justices were "at liberty in their free and unqualified discretion" to refuse the certificate: 45 & 46 Vict. c. 34, s. 1. The words of the Act are plain. They were evidently intended to confer on the justices an absolute discretion as to the granting of certificates, whether original or by way of renewal. The principal Licensing Act of 1828 (9 Geo. 4, c. 61), did not originally apply to beer-shops. By 4 & 5 Wm. 4, c. 85, s. 1, an excise license only was needed for the sale of beer to be consumed off the premises. The Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), provided for the granting of certificates for licenses, and by s. 8 the provisions of 9 Geo. 4, c. 61, have effect with regard to grants of certificates, subject to the qualification that no application for a certificate in respect of a license to sell beer not to be consumed on the premises shall be refused, except upon one or more of four specified grounds. 43 Vict. c. 6, s. 1, repealed s. 8 of the Wine and Beerhouse Act, 1869, as far as the qualification therein contained related to grants of certificates for additional licenses for sale of beer by retail for consumption off the premises, and provided that the licensing justices shall be at liberty either to refuse such certificates as aforesaid on any grounds appearing to them in the exercise of their discretion sufficient, or to grant the same. By 45 & 46 Vict. c. 34, s. 1, the Act now in question, that discretion as to additional licenses is extended and applied to a certificate for any license for sale of beer by retail to be consumed off the premises.

THE COURT called on

R. Henn Collins to support the rule. Assuming that the con-

struction which has been suggested will defeat vested interests, the Court should adopt another reasonable construction to avoid a consequence which the legislature probably did not intend, for many sections of the Licensing Acts shew that vested interests are protected. The justices who refused the certificate, although licensing justices, are not the "licensing justices" having jurisdiction within the meaning of 45 & 46 Vict. c. 34, s. 1. By s. 3 "words therein have the same meaning as in the Licensing Act, 1872." In that Act, 35 & 36 Vict. c. 94, s. 72, "licensing justices" means the justices having jurisdiction in respect of the grant of new licenses in a licensing district under the Intoxicating Liquor Licensing Act, 1828, as amended by this Act of 1872.

By s. 38, in boroughs such as Over Darwen, "new licenses shall be granted by a committee, who shall for the purposes of such new licenses perform all the duties and be subject to the obligations of licensing justices" . . . . "The grant of a new license by a borough licensing committee shall not be valid unless it is confirmed by the whole body of borough justices, or by a majority of such body present at any meeting assembled for the purpose of confirming such licenses." But by the interpretation clause, "The renewal of a license means a license granted at a general annual licensing meeting by way of renewal." If there is no distinction between an original grant of a license, and a renewal, that definition is unnecessary. The Act divides the duties as to the grant and renewal of licenses in boroughs. In boroughs new licenses are granted by a committee subject to confirmation by the general body of justices. In counties the new licenses are granted by the general body, subject to confirmation by a committee. No doubt the justices who refused the certificate were licensing justices, but were not sitting as a committee. Secondly. This application was for a certificate by way of renewal, and could only be refused on one or more of the grounds specified in the Act of 1869, s. 1.

FIELD, J. The language of the Act is clear. By 43 Vict. c. 6, s. 1, subs. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), was repealed as far as the qualification therein contained related to grants of certificates for additional licenses for the sale

1882

THE QUEEN v. KAY.

Field, J.

of beer by retail for consumption off the premises, so we know the meaning of the reference to the Act of 1880, in the preamble of the Act of 1882, which proceeds to recite that, "It is expedient to extend the provisions of the said Act to the granting of certificates for all licenses for sale of beer by retail for consumption off the premises." This recital shews the policy of this Act of 1882 to be the extension of the Act of 1880, by vesting in the justices a discretion in granting certificates for off licenses. Then comes the enactment in question. "The licensing justices shall be at liberty, in their free and unqualified discretion either to refuse a certificate for any license for the sale of beer by retail to be consumed off the premises, on any grounds appearing to them sufficient, or to grant the same." The first argument for the appellant is founded on the words "the licensing justices," which are said not to be meant to apply to such a case as this, because the words are, by s. 3, to have the same meaning as in the Licensing Act, 1872, and are by that Act defined to be the justices having jurisdiction in respect of the grant of new licenses in a licensing district under the Intoxicating Liquors Licensing Act, 1828, as amended by the Act of 1872, and it is argued that the legislature did not mean to give to those justices, who refused a certificate to the applicant who had been previously licensed, a discretion with respect to a renewed license. But I think that argument fails, and that the legislature have invested the licensing justices with an entirely new discretion, and they are the body by whom all these certificates are granted. The application in this case was for a certificate. But the learned counsel for the appellant pointed out that in the prior Act the legislature had drawn a great distinction between new licenses and licenses by way of renewal. They have done so in one respect. The legislature have said that when an applicant comes for a license in respect of a house not previously licensed, his neighbours ought to know of it and have an opportunity of opposing his application, and therefore, notices on the church doors, and notices of objection are prescribed to protect the justices in the exercise of their jurisdiction as to granting licenses. But when a man has once gone through that ordeal and the justices have granted a certificate, he obtains another certificate by way of renewal as a man occupying those

particular premises, and, subject to a careful provision, he need not attend in person unless required, and may assume that the certificate will be granted as before: 35 & 36 Vict. c. 94, s. 42; 37 & 38 Vict. c. 49, s. 26. As to the distinction between new licenses and licenses granted by way of renewal, every license is a new license, although granted to a man who has had one before, for it is only granted for one year. If the legislature intended the enactment in question only to apply to a certificate by way of renewal, why did not they say "any license other than by way of renewal?" They have not done so. The generality of the language used points clearly to the conclusion that the legislature meant to vest the absolute discretion in the justices.

STEPHEN, J. I am of the same opinion. It seems to me clear that this Act was intended to give to licensing justices an absolute power, and that they can either refuse or confirm these certificates on any ground they like, and whether the application is for a new certificate, or is made for the twentieth time, and whether the applicant is of unblemished character, as in the present case, or of bad character.

The power is not merely given, but is given in emphatic and vigorous language. The justices "shall be at liberty in their free and unqualified discretion . . . to refuse a certificate for any license for sale of beer by retail to be consumed off the premises, on any grounds, appearing to them sufficient." The word "may" would have been enough, but the legislature seem to have been anxious to prevent the possibility of doubt as to the absolute discretion given to the justices. Sect. 2 provides that "certificates for any such licenses as aforesaid," viz., for sale of beer by retail, to be consumed off the premises—"shall, notwithstanding anything in any Act now in force, be granted at general annual licensing meetings, and not at any other time." That could not be more clearly expressed. Mr. Collins tried to explain it away by reference to the interpretation clause in the Licensing Act, 1872, as to the words "licensing justices." But he admitted that the justices in question were, in fact, licensing justices within the meaning of the Act of 1872, although he contended that their power with respect to renewed licenses was different from their

1882

THE QUEEN v. KAY.

Stephen, J.

powers as to new licenses. I think that there may be some difference of procedure between an application for the first time and an application made after a similar one granted on a previous occasion, but I have no doubt as to the power of the justices in their discretion to refuse the application.

Rule discharged with costs.

Solicitors for appellant: *Pritchard & Englefield.*
Solicitor for respondent: *Hindle.*

J. R.

Dec. 19.

WINYARD, APPELLANT; TOOGOOD, RESPONDENT.

AND

HANCE, APPELLANT; FORTNUM, RESPONDENT.

Elementary Education—Elementary Education Act, 1876 (39 & 40 *Vict.* c. 79), ss. 4, 5, 8, 11—*Employment of Children*—"*Full Time Employment*"—*Attendance Order.*

By s. 5 of the Elementary Education Act, 1876, a person shall not take into his employment any child (1) who is under the age of ten years, or (2) who, being of the age of ten years or upwards, has not obtained the certificate of proficiency, or of due attendance at school, prescribed by the Act, unless such child, being of the age of ten years and upwards, is employed and attending school under the Factory Acts, or any by-law made under the Elementary Education Act, 1870.

By s. 11, if the parent of any child above the age of five years, "who is under this Act prohibited from being taken into full time employment," habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for such child, an order that the child attend one of the prescribed schools may be obtained by the local authority of the district before a Court of summary jurisdiction.

By s. 48 "a child in this Act means a child between the ages of five and fourteen years."

An attendance order was applied for, under s. 11, in respect of two children aged nine and thirteen years respectively. Neither of the children were in any employment, nor attending any school, nor had either of them obtained any certificate under s. 5:—

Held, that the words of s. 11 "any child who is under this Act prohibited from being taken into full time employment" applied to any child prohibited from being taken into employment by s. 5, and therefore that an attendance order could be made in respect of each child.

Saunders v. *Crawford* (9 Q. B. D. 612) not followed.

THESE were two cases stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

The first case was stated by one of the magistrates of the Southwark Police Court, and the following are the material facts:—

On the 24th of June, 1882, the appellant obtained a summons, in his capacity as an officer of the School Board for London, against the respondent under the provisions of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79) s. 11, subs. 1, charging that the respondent, on the 14th of June, 1882, and on other days, being the parent of two children, named respectively Harry and Frederick, which children were above the age of five years and under the age of fourteen years, to wit, Harry, of the age of thirteen years or thereabouts, and Frederick, of the age of nine years or thereabouts, and were, by the Elementary Education Act, 1876, prohibited from being taken into full time employment, had, notwithstanding due warning already given him by the School Board for London, unlawfully, habitually, and without reasonable excuse, neglected to provide efficient elementary instruction for his said children, contrary to the provisions of the Elementary Education Act, 1876.

The summons was heard on the 1st of July, 1882, when it was proved (1.) that both children were above the age of five years and under the age of fourteen years; the child Harry being of the age of thirteen years, and the child Frederick of the age of nine years; (2.) that neither of the children had obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, as would except him, either partially or totally, from the obligation to attend school, and that nothing else had happened to enable them, or either of them, to be taken into full time employment, and that neither of the children were in any employment, and they could not receive efficient elementary instruction in reading, writing, and arithmetic if they were taken into full time employment; (3.) that the respondent habitually, and without reasonable excuse, had neglected to provide efficient elementary instruction for both the children; (4.) that due warning had been given to the parent before the complaint was preferred.

The magistrate refused to make an order in respect of the child between thirteen and fourteen years of age, on the ground that

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

he was bound by the decision in *Saunders* v. *Crawford* (1); and in order that the doubt might be cleared up as to whether that decision extended to children under thirteen years of age, he also refused to make an order with respect to the child under thirteen, but he stated in the case that if he had had power to make an order with respect to both or either of the children he should have done so.

The questions for the opinion of the Court were: (1.) Whether the magistrate had power to make an attendance order in respect of the child who was between thirteen and fourteen years of age; (2.) Whether he had power to make such an order in respect of the child nine years of age.

If the Court were of opinion that the magistrate had power to make an attendance order with respect to both or either of the children, the case was to be remitted for him to make such order or orders.

The second case was stated by two justices of the city of Liverpool, and it was admitted that the questions raised were substantially the same as in the first case. The two cases were therefore argued together.

Sir F. Herschell, S.G. (*Jeune*, with him), for the appellant in the first case. The decision in *Saunders* v. *Crawford* (1) proceeded upon a misapprehension of the effect of legislation, and therefore should not be followed. By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), school boards are empowered (s. 74) to make by-laws requiring the parents of children between the ages of five and thirteen to cause such children to attend school, determining the time during which they are so to attend, and imposing penalties upon the parents for the breach of any by-law previously made. By the Act of 1876, the age of children dealt with is raised to fourteen, for by s. 48 "a child in this Act means a child between the ages of five and fourteen years." By s. 4, "it shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by

(1) 9 Q. B. D. 612.

this Act." By s. 5, "a person shall not, after the commencement of this Act, take into his employment . . . any child (1.) who is under the age of ten years; or (2.) who being of the age of ten years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, as is in this Act in that behalf mentioned, unless such child, being of the age of ten years or upwards, is employed, and is attending school in accordance with the provisions of the Factory Acts, or of any by-law of the local authority (hereinafter mentioned) made under s. 74 of the Elementary Education Act, 1870, as amended by the Elementary Education Act, 1873, and this Act, and sanctioned by the Education Department." By s. 6 "Every person who takes a child into his employment in contravention of this Act, shall be liable, on summary conviction, to a penalty." Sect. 8 was passed in view of the different provisions, with respect to the employment and education of children, of the Factory and Workshop Acts. The provisions of the Acts relating to non-textile factories and to workshops dealt with children up to the age of thirteen. The Acts relating to textile factories, or what may be termed the Factory Acts proper, dealt with children up to the age of fourteen. Sect. 8 of the Act of 1876, was passed to make fourteen the limit of age, up to which children should be prohibited from being taken into full employment, in all factories and workshops. That object is effected by making certain provisions of the Factory Acts, 1844 and 1874, with respect to education and attendance at school, apply to the education and employment of all children employed in factories subject to the Factory Acts, 1833 to 1871, and not subject to the Factory Act, 1874, or employed in workshops subject to the Workshop Acts, 1867 to 1871.

By s. 11, if "the parent of any child above the age of five years who is under this Act prohibited from being taken into full time employment, habitually, and without reasonable excuse, neglects to provide efficient elementary education for his child," a Court of summary jurisdiction may order the attendance of the child at some certified efficient school, and by s. 12, where an attendance order is not complied with, without reasonable excuse, the Court

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

may inflict a penalty upon the parent, or may, under certain circumstances, in the last resort order the child to be sent to a certified industrial school.

By the Factory and Workshop Act, 1878 (41 Vict. c. 16), section 8 of the Elementary Education Act, 1876, is repealed, as are also the Factory Acts, 1844 and 1874, and the Workshop Regulation Act, 1867.

This being the state of legislation, the court in *Saunders* v. *Crawford* (1) held that s. 11, sub-s. 1, of the Elementary Education Act, 1876, applied only to parents of children between the ages of thirteen and fourteen employed in non-textile factories and workshops, who were, by the operation of s. 8, prohibited from being taken into full time employment under the provisions of the Factory Acts proper, which provisions were applied by s. 8 to those children.

First, it is contended that this construction of s. 11, sub-s. 1, ought not to be so limited, and that sub-s. 1 has no application to s. 8, but applies to parents of all children dealt with by s. 5, who are prohibited from being taken into any employment, or are permitted to be taken into partial employment, under the Act. The words "prohibited from being taken into full time employment," are large enough to include children not taken, nor capable of being taken, into any employment, as well as those who are permitted to be taken into partial employment. The words also "the parent of any child above the age of five years," shew that children, who are under the Act prohibited from being taken into any employment at all, are aimed at, because up to ten years of age no child under the Act can be taken into any employment, and it would therefore be unnecessary to refer to the age of five years in the section, if children only who, being above the age of ten years, might be partially employed under the Factory Acts were intended to be included. The object of the legislature being, as shewn by s. 4, to compel the parents of children between the ages of five and fourteen to cause them to receive efficient elementary instruction, it follows, if the decision in *Saunders* v. *Crawford* (1) be upheld, that where a child is kept at home without any instruction, and without being in any employment, there is no

(1) 9 Q. B. D. 612.

means of compelling his attendance at school under the Act. The "orders and penalties provided by this Act," to which the parent is to be liable under s. 4, are attendance orders, and the penalties consequent upon failure to comply therewith, under s. 11, for there are no other orders and penalties provided by the Act. If s. 11 only applies to s. 8, it only applies to parents of children between thirteen and fourteen in partial employment in non-textile factories and workshops, those being the only class of children which s. 8 affects; it follows that s. 11 would have no operation with respect to children employed under the General Factory Acts, and there would be no means of compelling their attendance at school. It is impossible that the legislature should have intended that result. The absurd consequence would follow that, whereas s. 8 was passed to put the two classes of children employed under the Factory and Workshop Acts in the same category, another provision of the Act itself creates a distinction between those classes. The power given by s. 12 of sending children dealt with by s. 11 to an industrial school (which power was not given by the Act of 1870) is of great importance, because it has been found in practice impossible to compel parents to cause them to receive efficient elementary instruction by proceeding only under by-laws made under the Act of 1870. The legislature cannot have intended the power to apply solely to the limited class of children dealt with, according to the decision in *Saunders* v. *Crawford* (1), by s. 8. If a child is not "under this Act prohibited from being taken into full time employment," he is permitted to be taken into full time employment, so that it would follow that, if the words of sub-section 1 do not include children prohibited to be taken into any employment, those children are permitted to be taken into full time employment. In *Ex parte School Board of London, Re Murphy* (2) it was held, upon a summons against the parent for not causing his child to attend school, contrary to by-laws made under the Elementary Education Act, 1870, that as it appeared that the parent had habitually neglected to provide instruction for the child within s. 11 of the Act of 1876, the magistrate had no option to allow a summons under the by-laws, but must direct one to be issued under s. 11. The child in that

(1) 9 Q. B. D. 612. (2) 2 Q. B. D. 397.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

case was under thirteen, but the point raised in the present case was not taken. The Elementary Education Act, 1880 (43 & 44 Vict. c. 23), s. 4, which was passed in view of that decision, gives an option to take proceedings either under by-laws made under the Act of 1870 (which by-laws can only be made with respect to a child under thirteen) or under s. 11 of the Act of 1876. Therefore the legislature have declared that s. 11, and the by-laws under the Act of 1870, apply to the same class of children, including those under thirteen. If it be true that, when s. 8 was repealed, sub-s. 1 of s. 11 ceased to have any operation, it is strange that the legislature in 1880 should provide an option of proceeding under that section.

Secondly, if the decision in *Saunders* v. *Crawford* (1) be correct, it is submitted that s. 8, and the provisions of the Acts to which it refers, are practically re-enacted in 41 Vict. c. 16 (which is a consolidating Act with respect to the Factory and Workshop Acts) by the operation of s. 102. If so, the magistrate had power to make an attendance order on the parent of the child over thirteen in the present case.

W. R. Kennedy, for the appellant in the second case, did not desire to argue except in reply.

Danckwerts, for the respondent in the first case. As to the first contention for the appellant, it is submitted that the decision in *Saunders* v. *Crawford* (1) was right. By reason of the repeal of s. 8 of the Act of 1876 there is now no child who satisfies the description in s. 11, sub-s. 1, as being "under this Act prohibited from being taken into full time employment," and no order can be made upon the parents of either of the children, because neither of them is in any employment, and s. 11 applied only to children employed in factories or workshops. If the appellant's contention be well founded, the words "full time employment" must be rejected as surplusage. The rule that in construing statutes full effect should, as far as possible, be given to all the words used according to their natural and ordinary meaning, should be applied here. In ordinary language it would be incorrect, in describing a person prohibited from being taken into any employment, to say that he was prohibited from being taken into full time employment.

(1) 9 Q. B. D. 612.

Sect. 11, sub-s. 1, is only a step in a procedure the result of which is to send the child to an industrial school, and the class of children, in respect of whom that strong measure may be taken, is defined in the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 14. They are children, apparently under the age of fourteen years, found begging or receiving alms, or wandering, and not having a home, or settled place of abode, or proper guardianship, or visible means of subsistence; or found destitute (either being orphans or having a surviving parent who is undergoing penal servitude or imprisonment), or who frequent the company of reputed thieves. The legislature never intended the power to apply to all children, in whatever rank of life, who were merely kept at home without sufficient elementary instruction. This is shewn by the excuses which may be made for non-attendance under s. 11, which differ somewhat from the excuses which may be made under s. 74 of the Education Act, 1870, and are more applicable to children of the industrial schools class. The words "above the age of five years" in sub-s. 1 of s. 11 shew that the sub-section was intended to apply to s. 8. It would have been unnecessary to insert those words if sub-s. 1 applied to s. 5, because by s. 48 "child in this Act means a child between the ages of five and fourteen." But in the Factory and Workshop Acts, to which s. 8 refers, the limits of age are respectively from birth up to thirteen, and from birth up to fourteen, and the object of the legislature in sub-s. 1 of s. 11 was to introduce the five years' limit also with respect to children subject to the Acts referred to in s. 8, who could be sent to an industrial school.

It is submitted that the effect of 43 & 44 Vict. c. 23, s. 4, is not necessarily to keep in operation sub-s. 1 of s. 11 of the Elementary Education Act, 1876, because the decision in *Ex parte the School Board of London, Re Murphy* (1) could apply as well to children coming within sub-s. 2 of s. 11 as to sub-s. 1.

[He was not required to argue the second point raised by the Solicitor General.]

R. S. Wright (*J. V. Austin*, with him), for the respondent in the second case. This Court ought not to dissent from the decision, in *Saunders* v. *Crawford* (2), of a Court of co-ordinate

(1) 2 Q. B. D. 397. (2) 9 Q. B. D. 612.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

jurisdiction unless that decision is clearly made out to be wrong. That rule was laid down by Bovill, C.J., and Brett, J., in *Hadfield's Case.* (1) On the construction of the Elementary Education Act, 1876 it is to be observed that, whilst the terms of s. 5 are very wide, dealing almost with every possible case of a child up to the age of fourteen, those of s. 11, sub-s. 1, are very narrow, and are more properly applicable to the subject of factory employment, the words "prohibited from being taken into full time employment" being such as most naturally would seem to refer to employment under the Factory Acts. It is, therefore, a more natural interpretation to limit the application of sub-s. 1 to the parents of the narrow class of children dealt with by the Factory and Workshop Acts, to which s. 8 refers.

W. R. Kennedy was not heard in reply.

LORD COLERIDGE, C.J. It has been thought proper to have this case, which raises a point of considerable importance, argued before a Court of five judges. The Court is so constituted in obedience to the express provisions of an Act of Parliament (2), and the reason why it has been so constituted is that the appellants in these cases desire to question the decision in *Saunders* v. *Crawford.* (3) It is admitted that the reasoning of the judgment in that case goes far beyond the particular case the two learned judges who decided it had before them, and affects a very large and important class, and it is suggested that the learned judges have themselves, since their judgment, expressed a desire that the question should be reconsidered. Whether that be so or not, it is certainly open to the appellants to have the decision in *Saunders* v. *Crawford* (3) reviewed. There is no constitutional objection to that, and I entirely assent to the principles, as laid down in *Hadfield's Case* (1), upon which the decision should be reviewed. In substance I take those principles to be that very great deference is due to the judgment of a Court of co-ordinate jurisdiction, and perhaps more deference when the judgment is that of the same Court which has to review it; and that the authority of a Court of co-ordinate jurisdiction upon any point

(1) Law Rep. 8 C. P. 306.

(2) See the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17.

(3) 9 Q. B. D. 612.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

Lord Coleridge, C.J.

should not be differed from or disregarded, except upon the clearest view that the decision is wrong. In old days before the power of appeal was enlarged, as in later days it has been, many extremely important questions came before the Courts of Queen's Bench, Common Pleas, and Exchequer, upon which the judgments of those Courts were final and conclusive between the parties. But those Courts, amongst themselves, nevertheless felt at liberty, under exceptional circumstances, to differ from a judgment which they thought was clearly wrong. Certainly, in the present cases, if I thought the matter was fairly doubtful, or that the judgment under review could be maintained upon a fair construction of the Act, I should defer at once to the authority of the learned judges, and should affirm the magistrate's decision; but, with every deference, I am unable, after having heard the arguments, to see that this is anything but a perfectly clear case, and I am encouraged to say so because I understand my learned brothers who decided *Saunders* v. *Crawford* (1) are not now perfectly satisfied with their decision. I am of opinion that the decision of the magistrate in the first case before us was erroneous and should be reversed. His decision was based upon the authority of *Saunders* v. *Crawford* (1), which he properly felt himself bound to follow, and in my opinion the decision in that case is itself erroneous. From the facts stated in this case (and, though the facts have not been stated in the other case, the question raised is admitted to be substantially the same), there is no doubt that both the children were under fourteen years of age, and prohibited under the Act from being taken into full time employment, and they were both the children of a parent who habitually, and without reasonable excuse, neglected to provide efficient elementary instruction for them. It seems to me that in so neglecting he was breaking a clear duty imposed upon him in plain terms by s. 4 of the Elementary Education Act, 1876, which, after imposing the duty, goes on to state the consequences of the parent's refusal to perform it, namely, that he shall be "liable to such orders and penalties as are provided by this Act." In this case an attendance order was applied for, and the question is, the duty being clear, and the breach being

(1) 9 Q. B. D. 612.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

Lord Coleridge, C.J.

clear, why should not that order be made? It is suggested that the order ought not to be made, because the words of s. 11, subs. 1, expressly refer only to children over the age of five years, "prohibited under this Act from being taken into full time employment," and therefore that the legislature intended the remedies given by the section to be applied only where there is a prohibition in terms, by virtue of the Act, against children being taken into full time employment. But the statute has not so limited its expressions. It was passed, as the definition in s. 48 shews, expressly to extend the age of children dealt with in respect of elementary instruction from thirteen to fourteen. It is admitted that if the narrower construction contended for by Mr. Danckwerts is placed upon s. 11, the very children, to secure elementary instruction for whom the Act was passed, and in respect of whom the limit of age was altered, may be habitually, and without reasonable excuse, neglected by their parents in respect of elementary education, and that nevertheless the parents are not liable to the orders and penalties provided by the Act, which obviously relate to a parent who neglects to perform the duty of making his child receive efficient elementary education. Whether the draughtsman of s. 11 may or may not have had in his mind s. 8, and whether he may or may not have intended, by using the words he did use, to limit the operation of the enactment in s. 11 in the way suggested, appears to me immaterial. I should think it exceedingly unlikely that he had that intention, but if he had, he has failed to use words which have carried it into effect, and, according to the well known saying, it is not "quod voluit parliamentum," but "quod dixit lex" that the Court must give effect to. I purposely abstain from going into other questions which do not appear to me essential for the determination of this case. Upon the short ground that here is a person within the plain words of the Act who has neglected a duty, and made himself liable to such an order as was here applied for, I am of opinion that the order ought to have been made, and that the decision of the learned magistrate must be reversed.

Upon the other question argued by the Solicitor-General I confess he entirely failed to convince me that the words of s. 102 of 41 Vict. c. 16 have kept alive the provisions of s. 8 of the

Elementary Education Act, 1876. But it is unnecessary to decide this question, and I base my judgment on the plain and short ground I have stated.

FIELD, J. I have arrived at the same conclusion, and substantially upon the same grounds as my Lord, but as the Court is called upon to give a judgment in conflict with the judgment in *Saunders* v. *Crawford* (1) I ought, out of respect to the Court who decided that case, to state very shortly my reasons.

I agree that if I entertained any serious doubt about the true construction of s. 11 of the Elementary Education Act, 1876, I should feel bound to follow the previous decision, but having very carefully followed the arguments in these cases I confess my view is very clear upon the matter. One of the children in the London case is under ten years of age, and unquestionably that child is prohibited from being employed at all under the clear words of s. 5. How is it possible to say that a child, who is prohibited from being taken into any employment at all, is not prohibited from being taken into full-time employment? He is prohibited from being taken into any employment, whether full-time, half-time, or any other. As to the child who is above ten, he is permitted under the Act to be taken into employment, the elements of the permission being, either that he shall have acquired a certain degree of education, of which a certificate is the proof, or that he shall be engaged in factory employment, where he will receive a certain amount of education. The second child in the London case was between thirteen and fourteen years of age, and did not satisfy either of the two requirements, and consequently that child was equally prohibited from being taken into full-time employment. The object of the Act is to provide for the education of children between the ages of five and fourteen, and to impose upon the parents, first of all, the duty of giving that education, and then to provide, that if the parent fails to perform his duty, an attendance order shall be made. It may be that the consequence pointed out by Mr. Danckwerts may follow, that a child of respectable parentage, and of honest habits, may ultimately find its way into an industrial school, but, although

(1) 9 Q. B. D. 612.

1882

WINYARD v. TOOGOOD.

HANCE v. FORTNUM.

that may be a consequence which one should endeavour to avoid as far as possible, it is no ground for holding that the plain meaning of the Act should not be followed. I entertain no doubt what the plain meaning of the Act is, and therefore I quite agree with the judgment of my Lord.

HAWKINS, J. I so entirely concur in my Lord's judgment that I do not think it necessary to pronounce a separate judgment.

STEPHEN, J. I entirely agree with the judgments of my Lord, and of my Brother Field. I think the words of the section are quite clear, though possibly they might have been made more immediately decisive if this point had been present to the mind of the draughtsman. But Mr. Danckwerts' argument did not succeed in raising any doubt in my mind as to the proper construction of the section. I may add that I feel strongly the inconvenience which might arise from our interpretation of the Act if the power to send a child to an industrial school were not exercised with great delicacy and caution. However that is a matter rather for the magistrates who have to administer this Act, and no doubt are fully alive to its importance.

WATKIN WILLIAMS, J. I am of the same opinion, for the reasons given by the Lord Chief Justice.

Cases remitted.

Solicitors for appellant in the first case: *Gedge, Kirby, Millett, & Morse.*

Solicitor for respondent: *The Solicitor to the Treasury.*

Solicitors for appellant in the second case: *Gregory, Rowcliffe, & Co., for Stone, Fletcher, & Hull, Liverpool.*

Solicitors for respondent: *Venn & Co., for Rayner, Liverpool.*

W. A.

THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS; CENTRAL WALES AND CARMARTHEN JUNCTION RAILWAY COMPANY, RESPONDENTS. 1882 *Dec.* 21.

Railway—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 11—*Through Traffic, Facilities for forwarding—Through Rate—Intermediate Railway Company, whether entitled to require through Rate for Traffic to and from Termini off their own Line.*

By s. 2 of the Railway and Canal Traffic Act, 1854, every railway company shall afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon its railway whether belonging to or worked by such company, and by s. 11 of the Regulation of Railways Act, 1876, the facilities to be so afforded are declared to be and shall include "the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of through traffic to and from the railway of any other such company at through rates." The Central Wales Railway Company applied to the Railway Commissioners for an order under s. 11, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route claimed being from Chester, over lines owned or worked by the London and North Western Railway Company, and over the applicants' own line, which was worked by the same company under an agreement with the applicants, and thence to Haverfordwest over the Great Western Company's line, which was worked and owned exclusively by that company, and vice versâ from Haverfordwest to Chester. The applicants had no rolling stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders:—

Held, that the traffic was "through traffic to and from" the applicants' railway, and that the applicants were a railway company entitled to request a through rate in respect of such traffic, within the meaning of s. 11, and therefore that the Railway Commissioners had jurisdiction to make the order.

CASE stated by the Railway Commissioners under s. 26 of 36 & 37 Vict. c. 48.

The material facts are fully stated in the judgment of the Court.

Dec. 8. *Webster*, Q.C. (*R. S. Wright*, with him), for the appellants. First, as the route in respect of which the Central Wales Railway Company have made their application commences and terminates off their own line, and their line is not worked by themselves, but is worked by the London and North Western Railway Company, it is submitted that the Central Wales Company are not entitled to request a through route and rate within

1882

GREAT WESTERN RAILWAY CO. v. CENTRAL WALES RAILWAY CO.

s. 11 of the Regulation of Railways Act, 1873. (1) The section is limited to through traffic "to or from" the railway of the applicant company, and does not apply to the case of an intermediate railway company, whose line is worked by another company. Here a consignment would merely pass over and along the Central Wales Railway, it would not start from or arrive at their line. The section contemplates that the company which applies for a through route and rate should be capable of having a similar application made against it. Here, as the applicants do not work their own line, they do not "receive, forward, or deliver," the traffic within the meaning of s. 11, and therefore they could not be applied against.

Secondly, admitting that the Central Wales Railway Company

(1) Sect. 11 of 36 & 37 Vict. c. 48, enacts that, "Whereas by s. 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

"And whereas it is expedient to explain and amend the said enactment: be it therefore enacted that,—

"Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to be and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, &c."

are for some purposes a railway company within the definition in s. 3 of the Act, they are not a railway company entitled to apply for a through route and rate within s. 11, because that section contemplates a company owning and working their railway.

Littler, Q.C. (*Bompas*, Q.C., and *J. W. Batten*, with him), for the respondents. The decision of the Court of Session in Scotland in the case of *Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (1) is a direct decision against the second contention argued for the appellants, and it is submitted that the Court, though not technically bound by that case, will not dissent from it unless strong grounds are shewn for so doing. As to the first contention, the statute clearly contemplates that a railway company may require a through route and rate from more than one other company, for sub-s. 1 of s. 11 provides that the applicant company shall give notice of the proposed through rate "to each forwarding company."

R. S. Wright, in reply. *Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (1) did not decide the question with respect to an intermediate railway, the railway of the applicant company in that case being a terminal one.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Field and Stephen, JJ.), was delivered by

FIELD, J. This is a case stated by the Railway Commissioners at the request of the Great Western Railway Company, on an application by the Central Wales Company for an order, under the 11th section of the Regulation of Railways Act, 1873, allowing a through route and rate for flour between Chester and Haverfordwest.

The route claimed from Chester to Haverfordwest was viâ Chester, the Craven Arms, and Llandilo Junction (over lines owned or worked over by the London and North Western Company) and the applicants' line (also worked over by the same company) by Abergwilly Junction, and thence by the Great Western line to Haverfordwest (exclusively owned and worked over by themselves) and vice versâ from Haverfordwest to Chester.

(1) 3 Nev. & Macn. 145.

1882

GREAT WESTERN RAILWAY CO. v. CENTRAL WALES RAILWAY CO.

It will be seen, therefore, that the route for which the "through rate" is required commences and terminates off the applicants' line, both the termini being on other lines. It appears also that the applicants have no rolling stock, and do not work their own railway. It is worked by the London and North Western Company under an agreement of the 29th of November, 1867, in correspondence with trains on their own system, and the receipts in respect of "through traffic" are apportioned between the two companies after deductions for terminal and working expenses according to their mileage proportion. The applicants, however, maintain and manage their own line, and collect, forward, and deliver their own traffic, the whole of the staff at the several stations on their line being employed and paid by them and under their orders.

On the hearing of the application by the Railway Commissioners they considered that the proposed route was "reasonable," and allowed a "through rate" accordingly, but, at the request of the Great Western Company, they stated the case for our opinion, the questions stated being as follows:

First: Whether the traffic in question is through traffic to or from the railway of the Central Wales Company within the meaning of s. 11 of the Regulation of Railways Act, 1873; and

Secondly: Whether in respect of such traffic the Central Wales Company are a company entitled to require such traffic to be forwarded within the meaning of the said section.

It will be recollected that by the Railway and Canal Traffic Act of 1854 it was enacted that every railway company should afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon its railway, whether it belonged to or was worked by it, and by the 11th section of the Regulation of Railways Act, 1873, those facilities were declared to be the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of "through traffic" to and from its railway at "through" rates, the requiring company being required to give a written notice to "each" forwarding company of the through rate and route.

The objections taken by the Great Western Railway Company were two, the most important being that the applicants were not

a railway company entitled to require a through route and rate within the meaning of the statute, on the ground that under the agreement with the London and North Western Company they did not work over their own line, and so it was said that, as they did not actually receive, forward, or deliver any part of the through traffic, they had no right to demand a route or rate in respect of it.

The Railway Commissioners were of opinion that this objection could not be sustained. Indeed they had arrived at the same conclusion under circumstances identical in principle, if not precisely in fact, and their judgment has been upheld by the Court of Session in Scotland refusing a prohibition.

That case is reported under the name of the *Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (1), and although not strictly binding upon us, the judgment of that Court is entitled to the greatest consideration and weight at our hands, and in the reasoning and decision of it we entirely agree.

The only differences between the two cases are that the applicants there were perhaps, according to the facts, a terminal, and not an intermediate company, which, as we shall presently say, does not affect their rights in this respect, and the other is one rather in favour of the applicants' right in this case, for in the Greenock case the applicants did not even maintain or manage their own line. If, therefore, they, in the language of the Lord President of the Court of Session, were not so far deprived of their interest in the line and traffic as to deprive them of the relief intended to be given by the 11th section, à fortiori the present applicants are not. We therefore answer the second question stated in the present case in the affirmative.

We give the same answer to the first question. We think that the traffic in respect of which the through rate is required, although commencing and ending as it does at stations off the applicants' line, is through traffic within the meaning of the 11th section. The Great Western are asked to "receive" or "deliver" at Abergwilly Junction. Traffic from and to any Central Wales station is clearly "through" traffic at that point, and we fail to see what difference it makes that the goods to be "received" or "delivered" have come from, or are going to,

(1) 3 Nev. & Macn. 145.

1882

GREAT WESTERN RAILWAY CO. v. CENTRAL WALES RAILWAY CO.

stations off the applicants' line. It is not the termini of the route which are material; it is the point of contact at which the facilities are required to be given, or where the obstruction or refusal takes place. It was admitted by Mr. Webster that, if this question had to be answered differently, all the railways in Great Britain and Ireland in the same position as the North Eastern with its system (interchanging traffic, as it does, with other companies at both termini) would be entirely shut out from the benefit intended to be conferred on railways and the public by the legislature by the 11th section, and we can see no reason for supposing that so great a restriction was intended to be imposed upon legislation so much in the interest of the public, which provides for traffic being forwarded by the shortest route, and consequently at the cheapest rate.

Judgment for the Respondents.

Solicitor for appellants: *R. R. Nelson.*
Solicitors for respondents: *S. F. & H. Noyes.*

W. A.

1877
April 30.

[IN THE COURT OF APPEAL.]

SCOTT *v.* LEGG.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 27, 28, 106—*Appeal —Conviction—United Buildings—Party-wall.*

By s. 9 of the Metropolitan Buildings Act, 1855, an addition to an old building is subject to the regulations of the Act; by s. 27, rule 4, certain buildings containing more than 216,000 cubic feet are to be divided by party-walls; and by s. 28, rule 2, no buildings shall be united, if when so united they will be in contravention of the Act. A new building was added to an old building, the united building containing more than 216,000 cubic feet:—

Held, that the united building was not within the words of the Act, and need not be divided by a party-wall.

An appeal from the decision of a magistrate will lie under s. 106 of the Act, although there has not been a conviction.

APPEAL from the judgment of the Exchequer Division upon a special case under the Metropolitan Buildings Act (18 & 19 Vict. c. 122) (1).

(1) By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 3, "Builder" shall apply to and include the master builder or other person

1877

SCOTT v. LEGG.

The facts are fully stated in the report in the Court below (1), and it will be sufficient to state that Messrs. Charrington, Head, & Co. added to an old building a new building, that the two together contained more than 216,000 feet, and the district surveyor of the Metropolitan Board of Works preferred before a magistrate a complaint against the builder, charging that the building ought to be separated by a party-wall. The magistrate held that the case came within the Act, and made an order for a party-wall to be built. The builder gave notice of appeal, and a special case was stated for the opinion of the Court. It was heard before Cleasby, B., and Grove, J., who agreed with the magistrate and dismissed the appeal.

The builder appealed.

April 28. *Benjamin, Q.C.*, and *Glyn*, for the appellant.

F. M. White, Q.C., and *Biron*, for the respondent, took the objection that an appeal is by s. 106 of the Buildings Act only given in case of a conviction. Here there was no conviction as

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employed to execute or who actually executes any work upon any building."

Sect. 7: "With the exemptions hereinbefore mentioned, this Act shall apply to all new buildings, and whenever mention is herein made of any building it shall, unless the contrary appears from the context, be deemed to imply a new building."

Sect. 9: "Any alteration, addition, or other work made or done for any purpose, except that of necessary repair not affecting the construction of any external or party wall, in, to, or upon any old building, or in, to, or upon any new building after the roof has been covered in, shall to the extent of such alteration, addition, or work, be subject to the regulations of this Act."

Sect. 27, rule 4: "Every warehouse or other building used either wholly or in part for the purposes of trade or manufacture, containing more than 216,000 cubic feet, shall be divided by party walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet."

Sect. 28, rule 2: "No buildings shall be united if, when so united, they will, considered as one building only, be in contravention of any of the provisions of this Act."

Sect. 106: "In every case except in respect of fees of a district surveyor, in which jurisdiction is hereinbefore given to a justice of the peace, if either party to any such case is dissatisfied with the determination of the justice so convicting, in respect of any point of law, or of the admission or rejection of any evidence, he may appeal to the Superior Courts of Common Law at Westminster."

Sect. 107: "Such appeal is to be by special case."

(1) 2 Ex. D. 39.

1877

SCOTT v. LEGG.

there was no penalty, and the magistrate had no power under s. 107 to state and settle a special case.

Benjamin, Q.C., for the appellant. The clear meaning of the Act is that there is to be an appeal from the decision of the magistrate. Moreover, it is too late now to take this objection.

COLERIDGE, C.J. I think there is nothing in the objection.

BRAMWELL, L.J. In my opinion the word "convicting" must be read "acting," because other parts of the sentence require that meaning. The objection must be overruled.

BRETT, L.J., concurred.

April 30. The question on the construction of the Act was argued by

Benjamin, Q.C., and *Glyn*, for the appellant.

F. M. White, Q.C., and *Biron*, for the respondent.

JAMES, L.J. I am of opinion that the judgment of the Exchequer Division must be reversed. No doubt it probably is a source of mischief to have buildings of inordinate size in a large town like London, where fires may produce great mischief; but it seems to me that we cannot, because we think there is a mischief, the existence of which is not provided for by the Act, depart from what appears to me, with all respect to the judgment of Cleasby, B., the plain meaning of the Act of Parliament. Provisions were made for the public safety; but, having regard to existing interests, those provisions were made subject to the existing interests, and old buildings, old warehouses, old manufactories, however large they might be, were left unaffected by the Act. And in order not to embarrass the proprietor of any old buildings or manufactories, the Act went on to say that it should be lawful for them to make any addition, alteration, or other work to their old building, but with this proviso, and this proviso only, that to the extent of such alteration, addition, or work, the same shall be subject to the regulations of this Act. That is the limit which the Act of Parliament, in my view, has put upon the power of the owner of the old building to deal with it, unaffected by the pro-

visions of this Act. Then it appears to me on the question of fact, that what has been done here has clearly been an alteration by way of an addition to the existing building, and that it would be impossible for us, on the plain meaning of the words, to suppose that a man could not erect a wall—not a party-wall of any kind, not a wall separating a building from any other building,—but a wall in his own premises, which might be merely a lath and plaster wall, or anything else he chooses to put up there, so as to bring in an additional piece of vacant ground under his old roof. It seems to me it would be straining the meaning of the words to hold that this is a union of two existing buildings which are within the meaning of the Act of Parliament. If such a provision as that were required, it would be very easy for the legislature to make such a provision by saying, in plain words, that no alteration, addition, or other work shall be made to any existing building if the aggregate of the old building and the other shall exceed 216,000 cubic feet. They have not said so, and we cannot say so for them upon any speculation as to what the intention of the legislature was with regard to the mischief. I am of opinion that the appellant ought to succeed.

BAGGALLAY, L.J. I am of the same opinion. It appears to me to have been the intention of the legislature to draw a distinction between an addition to an old building and the uniting of two buildings, and the 9th section was introduced for that purpose, and is applicable to the present case. It may be shortly stated thus:—Any addition to any old building shall, to the extent of such addition, be subject to the regulations of this Act. That is to say, the addition, and the addition alone, shall become subject to the regulations of the Act, and if it contains more than the prescribed number of cubic feet, then it must have those divisions which the other portions of the Act of Parliament provided for. In the present case it is admitted that the new building does not contain more than the specified number of cubic feet, and, therefore, it is not necessary, under the 9th section, to impose any fetters on the builder as regards the erection of walls; but it is suggested that it comes under the 28th section. Now the second rule of the 28th section is the only one that can be treated as

1877

SCOTT v. LEGG.

applicable to it—that as regards united buildings. It is that no two buildings shall be united, if when so united they will, considered as one building only, be in contravention of any of the provisions of the Act. It is true that if you can regard this as two buildings which are being united, they will, when united, contain a larger number of cubic feet than the specified number. I am of opinion that they are not two buildings united. I apprehend for the uniting of two buildings there must be two buildings. It means that there must be two existing buildings at the time of the union.

BRAMWELL, L.J. I am entirely of the same opinion. I hardly know whether I can add anything profitably to what has been said already; but I think there might be a new building added to an old one in the course of erection of the new if it were really and substantially a new building. It is difficult to define such a thing. But suppose it were a different thing, for instance, that the old building was applicable to one purpose and the new building was intended for an entirely different purpose, and there was a union. It seems to me that is not the case here. I think this is not a new building, and I think one criterion of it, in addition to those already given, is that, if it were a new building there was an obligation to have a party-wall between that building and the old one. Can anybody so contend in this case? Mr. White scarcely so contended. It seems to me that it was intended to leave owners of old buildings unfettered by the Buildings Act except by the powers especially provided. If I understand Mr. White's argument rightly this consequence would follow, that if the old wall had been taken out and rebuilt with a rectification of frontier, and a few feet had been included in the new buildings, that would have brought the whole building within the Act of Parliament. I would observe that no answer has been given to the case put by James, L.J., that under the Act of Parliament, according to Mr. White's argument, you could not throw out a bay-window or a lean-to. It seems to me that it was intended that additions and alterations should be made, and I declare I hardly know the meaning of those sections in the Act of Parliament if this could not be done. As I said before, there might be

1877

SCOTT v. LEGG

something called an addition which was in reality a new building, but this is not so to my mind. It is an addition to, and an alteration of, the old building.

BRETT, L.J. I am of opinion that this case is not within s. 28, because no two buildings were united. I am of opinion that it is not within s. 27, because the obligation of s. 27 is confined by s. 9 to the case of an addition, and in this case the addition was not large enough to bring it within the statute; therefore it is within neither the 27th nor the 28th section.

Judgment for the appellant. (1)

Solicitors for appellant: *Loxley & Morley.*
Solicitor for Board of Works: *W. Wyke Smith.*

C. M.

[IN THE COURT OF APPEAL.]

1882
Nov. 24.

KAY *v.* FIELD & CO.

Shipping—Charterparty, construction of—Customary manner of Loading—Detention by Frost—Demurrage.

By the terms of a charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron, the cargo to be loaded as fast as ship could take on board and stow within the customary working hours of the port, commencing when ship was in berth and ready to load, "detention by frost, floods, &c., not to be reckoned as lay days." At Cardiff there are two docks, the East Bute Dock and the West Bute Dock, connected by a canal, and the West Bute Dock is connected by a junction canal with the Glamorganshire Canal. The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six manufacturers of rail iron there, and all of them (with the exception of the freighters' agents) had wharves in the East or West Bute Dock. The agent's wharf was on the Glamorganshire Canal, nearly opposite the junction canal, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down the junction canal, through the West Bute Dock, and from thence through the connecting canal to the East Bute Dock. The other manufacturers loaded ships in the East Bute Dock, either from the quay or by lighters coming from their wharves.

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(1) This case has not been reported earlier, owing, it is believed, to the illness, which terminated in the lamented death, of one of the reporters for the Court of Appeal at the date of the decision.

1882

KAY v. FIELD.

The ship on arrival was berthed in the East Bute Dock, and the loading was commenced, but it was delayed afterwards for sixteen days by frost, which covered with ice the junction canal, from the agent's wharf to the West Bute Dock, and prevented there the passage of the lighters, though the water in the docks was not frozen:—

Held, reversing the decision of Pollock, B., that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability for demurrage, as the lighters with the cargo for the ship had not got within the limits of the East Bute Dock where the ship was to be loaded, before the detention by frost had happened.

APPEAL by the plaintiff from the judgment of Pollock, B., on further consideration. The material facts are fully set out in the report of the case in the Queen's Bench Division (1), and as they are also stated hereafter in the judgment of Brett, L.J., it is sufficient here to refer only to the short statement of them in the head-note.

Sir F. Herschell, S.G., and *McIntyre, Q.C.* (*Brynmor Jones*, with them), for the plaintiff. In the Queen's Bench Division, Pollock, B., was of opinion that the present case was in a great measure governed by *Hudson* v. *Ede* (2), but when that case is carefully examined, it will be found to be in truth a decision in favour of the plaintiff and not of the defendants. The whole reasoning of the judgment supports the contention for the present plaintiff. The exception as to frost does not apply to the circumstances of the present case, and then it becomes clear that the plaintiff's vessel was not loaded as fast as she could take on board: *Kearon* v. *Pearson*. (3) The words in the charterparty "customary manner," refer only to the mode of loading, not to the time to be occupied nor to the spot to which the cargo was to come: *Tapscott* v. *Balfour*. (4) The practice of a merchant who has a large business cannot make a "custom" in a port: *Lawson* v. *Burness* (5), and the referee has not found that the mode of forwarding iron from the wharf of Crawshay & Co. is a customary mode of loading at the port. (6)

(1) 8 Q. B. D. 594.

(2) Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412.

(3) 7 H. & N. 386; 31 L. J. (Ex.) 1.

(4) Law Rep. 8 C. P. 46.

(5) 1 H. & C. 396.

(6) *Sir F. Herschell, S.G.*, contended that upon the pleadings the plaintiff was entitled to demurrage, at all events for one day, as the 11th of January, on which the vessel was ready to take on board cargo, ought to be reckoned as

1882

KAY v. FIELD.

Butt, Q.C., and *Channell* (*Dillwyn*, with them), for the defendants. It is not correct to say, as contended for on behalf of the plaintiff, that it was the duty of the charterers to have the cargo at the East Bute Dock ready for loading the plaintiff's ship. The loading was by the terms of the charterparty to be in the customary manner from the agents of the freighters, and it is found by the referee that there are two usual modes of loading, namely, from the quay or from lighters, and when a vessel has to be loaded in the East Bute Dock with rail iron from wharves in the West Bute Dock the usual mode is, as found by the referee, to send the iron by lighters through the canal which forms the junction between those two docks. If such is part of the customary mode of loading at the East Bute Dock, why should not the exception as to detention by frost, &c., apply to the canal? It is by means of this custom that the wharves at West Bute Dock and also Crawshay's Wharf are all within the range of the port at Cardiff. The detention by the causes mentioned in this charterparty is wider than it was in *Hudson* v. *Ede* (1), as there it was limited to "detention by ice and quarantine." Here it is "detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine," several of which causes, such as floods, strikes of workmen, &c., must extend to matters happening beyond the port. No doubt Lord Blackburn in delivering judgment in *Hudson* v. *Ede* (1) said that the Court might have come to a different conclusion in that case if there had been any other practicable mode by which cargo might have been brought by land to Sulina, but there was no decision there that if there had been a place lower down the Danube than Galatz at which a cargo could have been stored, the exception would not have applied. *Tapscott* v. *Balfour* (2) is not an authority against what is contended for on behalf of the defendants, but rather supports it, since, as found by the referee, the customary mode of loading is not confined to loading from

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one day: *Commercial Steamship Co.* v. *Boulton* (Law Rep. 10 Q. B. 346), but by reason of the judgment given in favour of the plaintiff for the demurrage claimed this point became immaterial and no decision was given upon it. For this reason the argument upon it is omitted.

(1) Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412.

(2) Law Rep. 8 C. P. 46.

1882

KAY v. FIELD.

the quay at the East Bute Dock, but applies to goods coming in lighters through the canal which unites that dock with the West Bute Dock. Loading by lighters which come from Crawshay's Wharf is equally one of the customary modes of loading, and therefore the exception as to detention applies in this case.

Sir F. Herschell, S.G., replied.

BAGGALLAY, L.J. The plaintiff's claim is for demurrage for delay in loading his ship. By the terms of the charterparty the plaintiff's steamer *Cid* was to proceed to Cardiff East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron. There is then this provision, "The cargo to be loaded as fast as steamer can take on board and stow, within the customary working hours of the port (Sundays and holidays excepted) commencing when steamer is in berth and ready to load." Then follows this exception, "Detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine, not to be reckoned as lay days." In fact the plaintiff's vessel was ready to load on the 11th of January, 1881, and the loading was completed on the 2nd of February following. There was therefore between these two dates an interval of twenty-two days, and the plaintiff's case was that six days were sufficient for the loading, and that consequently he was entitled to claim demurrage for sixteen days. The defendants' case was that there had been a frost after the loading had commenced which had occasioned the delay, and he claimed on that account the benefit of the exception. The question, therefore, turns on the construction of the charterparty and the application of the exception. The Solicitor-General on behalf of the plaintiff contended that the detention to which the exception applies is from a cause which arises within the place of loading and after a time when the vessel ought to have begun loading, and that, as the plaintiff's vessel was in the dock ready to load on the 11th of January, to make the exception apply, there must have been some delay by frost after the lighters had arrived with the cargo at the place of loading. For the defendants it was contended that we ought not to put so narrow a construction on the exception, and that we ought to consider all the wharves and places in the East

and West Bute Docks used by the rail iron manufacturers for storing their rails as part of one and the same dock, and to treat all these places, and also that of Messrs. Crawshay & Co., as if they were within the East Bute Dock. Now I do not agree to that construction on the part of the defendants, for it does not appear to me to be according to the meaning of the charterparty. The loading must begin from the time when the vessel which has to carry the cargo is in a position to receive it. No doubt the place of loading may be enlarged. In *Hudson* v. *Ede* (1) Galatz was considered the place of loading, but that was in consequence of the special circumstances of that case, and because there were no other means of shipping a cargo at Sulina except by conveying it by river between Galatz and Sulina, and therefore the loading was there held to commence from the time it left its store place at Galatz. I do not think that the facts stated by the referee in the present case are sufficient to bring it within that of *Hudson* v. *Ede*. (1) The true view to be taken of the charterparty here is, I think, that the cause of the detention must happen after the lighter which brings the cargo has got within the limits of the dock contemplated by the charterparty as that at which the vessel is to be loaded. That had not taken place here, and therefore in my opinion this appeal must be allowed.

BRETT, L.J. In this case we have to apply certain facts to a charterparty, and a great difficulty arises in ascertaining those facts. Taking them in the best way I can from the report of the official referee, to whom all the matters in the cause were referred, it appears that at Cardiff there are the East Bute Docks and the West Bute Docks and other docks. There is a water junction between the East Bute Dock and the West Bute Dock by means of a short canal, and there is also a mode of bringing goods from the Glamorganshire Canal, which by a junction canal, has a water communication with the West Bute Dock, and when once in the West Bute Dock goods can be taken by water to the East Bute Dock. I further gather from the report that rail iron shipped at Cardiff is almost always manufactured by five or six manufacturers who have their works at some distance from Cardiff, and

(1) Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412.

1882

KAY v. FIELD.

some of them have wharves or store places at West Bute Dock and some at East Bute Dock, but Messrs. Crawshay & Co., who are one of such manufacturers, have a wharf or place of deposit for their iron, not at either of those docks, but on the Glamorganshire Canal, near the junction canal which connects it with the West Bute Dock. Now manufacturers who have wharves on the West Bute Dock, and who desire to ship their rail iron on a large ship do so by lighters, which take the iron through the canal to the East Bute Dock, as a large ship cannot enter the West Bute Dock. Manufacturers, however, who have wharves on the East Bute Dock when they have to load a vessel load her either by lighters or from the quay. Messrs. Crawshay & Co., because their store place was on the Glamorganshire Canal, and not on the East Bute Dock, have for more than thirty years been in the habit of sending their iron by lighters along the junction canal into the West Bute Dock, and from thence through the short canal to the East Bute Dock. Therefore with respect to loading a vessel in the East Bute Dock with rail iron, there are three distinct different modes, one by those manufacturers who have places of deposit for their iron at the East Bute Dock, another by those who have their places of deposit at the West Bute Dock, and a third by Messrs. Crawshay & Co. There is no one mode by which all rail iron is shipped on board a vessel in the East Bute Dock. Under these circumstances a charterparty is entered into with the plaintiff not by any one of these manufacturers of rail iron, but by ordinary freighters, and by the terms of that charterparty the ship is to proceed, not to Cardiff, but to Cardiff East Bute Dock, and there load from the agents of the freighters a full and complete cargo of rail iron of about 1700 tons. The loading is to be within the customary working hours of the port, Sundays and holidays excepted, commencing when the vessel is in berth and ready to load, and is to be at the rate of not less than 200 tons per working day, for it seems to be admitted that that would be the proper rate of loading unless prevented by weather, so that the time for the loading would be some six days. The charterparty then contains this exception: "Detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine not to be reckoned as lay days." This is peculiar, for no

lay days are specifically mentioned in the charterparty, and the only way of getting at these is by seeing by calculation how many days it would take to load the ship, and that would appear to be six days. Now what is the state of affairs as between the shipowner and the charterers? It is obvious that at the time when the charterparty was made the shipowner had no means of knowing from which of these six or more manufacturers the rail iron would come for his cargo at Cardiff. The circumstances therefore depend upon what he is afterwards told by the freighters. In the absence of such information the duty of the shipowner under this charterparty was to take his ship, not merely to Cardiff but to East Bute Dock, but having done so, and there berthed her and made her ready to load, his duty was at an end, and then arose the duty of the charterers which was immediately to begin loading.

The first question is, whether this charterparty ought to be construed in this case as if the East Bute Dock was the only dock at Cardiff; that is to say, the port there. I think, according to authority, that the only place to be considered with reference to the loading of the ship is the East Bute Dock, and that one has no right to consider anything with regard to the West Bute Dock or any part of the town of Cardiff. Then if a loading is to be at a particular dock, when can it be considered to commence? All stipulations as to loading apply, I think, to that place at which it is actually to take place, unless there is something in the charterparty to the contrary, and therefore in the present case they all apply to the East Bute Dock. Whatever is done with the goods or happens to them during their conveyance before they get there, is no part of the loading. The loading therefore would here commence when the goods were in the East Bute Dock. That was so held in *Hudson* v. *Ede*. (1) If so, that is if every stipulation as to loading applies to the place where the loading is to be done, then the excuse for not so loading is confined to the same place, consequently, the detention of the ship by reason of the charterers being prevented by frost from loading, must be read as meaning a detention which prevented them by frost from loading at the East Bute Dock. It was said that

(1) Law Rep. 2 Q. B. 566; and in error, Law Rep. 3 Q. B. 412.

1882

KAY v. FIELD.

this ought to be altered by reason of the words in the charterparty, "and there load in the customary manner;" but those words, I think, must be taken as referring to the customary manner of loading in the East Bute Dock, which is the place of loading.

Then it was said that under the circumstances of the present case as the loading was to be done by Messrs. Crawshay & Co. it commenced before the arrival of the rail iron at the East Bute Dock, namely, when it left Messrs. Crawshay & Co.'s wharf about a mile off from the East Bute Dock. Now under what circumstances can we go beyond the limits of the port or dock mentioned in the charterparty as the place for loading? There are, it is true, some circumstances under which one can do so, for that was decided in *Hudson* v. *Ede* (1), by which case we are bound. The circumstances there were, as it is admitted, exceptional. There the obligation of the shipowner was to take his ship to the port of Sulina, and the loading of the cargo would under ordinary circumstances commence in that port by bringing the goods from the shore, but that it was proved not that some but that all the shippers of grain at that port brought the grain down to it in lighters from Galatz, a port some 100 miles higher up the river, and the Court expressly relied on the fact that every shipper of grain shipped it at Sulina in that way, and, therefore, that every shipowner who sent ships to that port must be presumed to have known that which was the usual custom of that port, and, consequently, when there was an exception in the charterparty which relieved the shipper from liability for detention in case of frost, the shipowner must be taken to have known that the exception was applicable to the loading from Galatz, although that was not within the port of Sulina. The Chief Baron adds an expression in his judgment in that case which shews that even if there had been one shipper who had not shipped grain at that port in that way, it might have made a difference; and it is obvious as well from the observations in that case by Lord Blackburn, then Blackburn, J., as from that addition by the Chief Baron which was made at the suggestion of Willes, J., that the foundation of the judgment of the Court in *Hudson* v. *Ede* (1),

(1) Law Rep. 2 Q. B. 566; and in error, Law Rep. 3 Q. B. 412.

was that every shipper of grain at Sulina shipped it in that way. The present case does not come within the exception which was allowed in that case, and the learned Judge who decided the present case partly upon the authority of *Hudson* v. *Ede* (1) was, I think, wrong in considering that the facts brought it within the exception upon which that case was determined. I am of opinion, therefore, that the judgment of Pollock, B., ought to be reversed.

LINDLEY, L.J. I also am of opinion that the judgment of Pollock, B., was erroneous. The case really turns on the construction of the charterparty, which may be divided into two parts. The first part relates to the duty of the shipowner; he is to send his ship to the East Bute Dock and there load in the customary manner. This first part does not profess to define the duty of the shippers, and it has no application as to the method of getting the goods to the East Bute Dock; the goods are supposed to be there, and being there the shippers are to load the ship. The other part of the charterparty which relates to the shippers and requires the cargo to be loaded as fast as the vessel can take on board and stow, contains a clause exonerating the shippers in case of detention by frost and the other causes there mentioned. Now we are asked to apply that to a case where the detention by frost has prevented the shippers from getting the cargo to the East Bute Dock. I apprehend we cannot do so, and that according to the true construction of the charterparty, the stipulation exonerating the shippers applies only to a detention from the causes there mentioned after the cargo has been brought to the place of loading. The case of *Hudson* v. *Ede* (1) is the only case cited bearing on the point, and that shews that this stipulation in case of detention, ought not to be applied to the present case. In *Hudson* v. *Ede* (1) the act of loading must be considered as having begun at a farther place than at the port of Sulina. The Chief Baron adds this at the end of his judgment: "My Brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandize was conveyed direct

(1) Law Rep. 2 Q. B. 566; in error, Law Rep. 3 Q. B. 412.

1882

KAY v. FIELD.

to the ship, the exception in the charterparty would apply." That was I think the real ratio decidendi of that case, and as the facts of the present case do not bring it within that principle the judgment must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Ingledew & Ince, for Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for defendants: *Nicol, Son, & Jones.*

W. P.

Dec. 19.

[IN THE COURT OF APPEAL.]

BROWN *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Railway—Carrier—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict.* c. 31), *s.* 7—*Alternative Rates—Special Condition.*

The defendants, a railway company, were in the habit of receiving consignments of fish from fish merchants, of whom the plaintiff was one, at a seaport to be carried by trains which arrived in London in time for the Billingsgate Market at 5 A.M. The defendants offered to those fish merchants, who were disposed to accept it, to carry the fish at rates one-fifth lower than the ordinary rates of carriage, if they would sign a risk note by which they undertook and agreed to relieve the defendants "from all liability for loss or damage by delay in transit, or from whatever other cause arising." The plaintiff signed such risk note, and afterwards delivered fish to the defendants to be carried at the lower rates. On one occasion, in consequence of an unusually large supply of fish, there was a delay in despatching the trains, so that the plaintiff's fish arrived too late for the Billingsgate Market. Though the defendants knew that the fish could not on this occasion be despatched at the ordinary time, they gave the plaintiff no notice of this, but received his fish as usual. In an action for such delay, by which the market had been lost:—

Held, reversing the decision of the Queen's Bench Division, that, as by the exigencies of trade the plaintiff, in order to compete with others in the trade, was obliged to send his fish at the lower rates offered by the defendants, he practically had no option, and therefore the contract contained in the risk note, by which the plaintiff freed the defendants from all liability, was not just or reasonable, and was invalid by s. 7 of the Railway and Canal Traffic Act, 1854:

Semble, per Baggallay and Brett, L.JJ., that even if there had been an option, yet a contract such as above, by which the railway company were freed from all liability however occasioned, was not just or reasonable:

Held, further, that the delay, the subject of the action, was not outside the contract, but was covered by it.

And also that s. 7 of the Railway and Canal Traffic Act, 1854, included loss

from delay, but at all events, even if it did not, that the above contract was one and indivisible, and as it was void as to other losses which it covered, it was void altogether.

Overruled by H. of L. 8 App. Cas. 703 H.L.

APPEAL by the plaintiff from the decision of the Queen's Bench Division on a special case stated by the county court judge at Great Grimsby. The material facts of which were as follows:—

The plaintiff was a fish merchant carrying on business at Great Grimsby, where there were many fish merchants from whom, as well as the plaintiff, the defendants had been in the habit of receiving daily quantities of cod and other fish to be forwarded to London and other places. In the case of cod-fish the practice was for the fish merchants to take the cod from a fish-dock at Great Grimsby, where it had been kept alive, and then to stun it and place it in baskets which were carried in trucks or vans of the defendants along a rail to the town station of Great Grimsby, from whence they were despatched to their several destinations. Fish consigned to London for the Billingsgate Market, if it arrived at the town station in time and in not too large quantities, was taken by the ordinary mail train which left Grimsby at 8.13 P.M., otherwise it was sent by a fish train at 8.40 P.M.; but whether sent by the ordinary or by the special train the fish arrived in London in time to reach Billingsgate at or before the opening of the market at 5 A.M.

On the 28th of December, 1880, the plaintiff signed a "risk note," in a lithograph form supplied by the defendants, which was as follows:—

"Manchester, Sheffield, and Lincolnshire Railway.

"Risk Note.

"Grimsby Docks Station,

"28th Dec., 1880,

"Mr. Henry Brown. "Fish Traffic.

"Sir,—I beg to inform you that to parties willing to free and relieve this company and the other railway companies over whose lines fish may be forwarded from any of our stations from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

one-fifth lower than where no such undertaking as the annexed is granted.

"For and on behalf of the company,
(Signed) "James Reed."

"28th Dec., 1880.

"Sir,—In reference to the above, I request that you will forward all fish delivered by me, or on my account, from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claim or liability for loss or damage.

"This undertaking to remain in force from the present date until the 31st of December, 1885.

(Signed) "Henry William Brown."

"Mr. Reed.

After the making of this risk note all fish delivered by the plaintiff to be forwarded by the defendants was forwarded by them at certain rates mentioned in the case which, it was admitted in the argument, were a fifth lower than the published legal rates which the defendants charged for carriage where there was no conditions attached, and in respect of which, therefore, they were liable as common carriers.

On the 13th of April, 1881, two days before Good Friday, the quantity of fish delivered to the defendants to be forwarded from Great Grimsby by the fish merchants was greatly in excess of any previous year at the same season; but though it became apparent that if all the fish so delivered was to be accepted for carriage by the defendants, the fish trains could not be got away at the usual time, no consignment of fish was refused, nor was any warning or notice given to the plaintiff by the defendants at any time throughout the day. The plaintiff therefore stunned his fish and packed them ready to be hauled away by the defendants and despatched to London, but had he received notice of the state of matters, even only immediately before he stunned his fish, he would have suffered no damage, because he would then have kept his fish alive in the dock till he could have sent it away.

The defendants, in anticipation of the great glut of fish, engaged

on the said 13th of April additional men to assist in the loading, but in spite of such assistance the starting of all the fish trains was greatly delayed, and the van containing the plaintiff's fish was attached to a special fish train which left Grimsby Town Station at 3.25 A.M. on the 14th of April, instead of 8.40 P.M. on the 13th of April, and by reason of the said delay in the departure, the plaintiff's fish was too late for the Billingsgate Market on the 14th April and the plaintiff suffered a loss, the amount of which was agreed upon as 1*l.*

In order to despatch the van containing the plaintiff's fish so as to reach the market in time as usual it would have been necessary to have drawn the vans for London as they were loaded from out of the general mass of trucks and vans standing after being loaded, but to have taken this course would have still further delayed the despatch of all the other fish trains, and would have caused additional expense to the defendants.

The judge of the county court held that the defendants had failed to justify the delay, and that they were not protected by the "Risk Note," which the plaintiff had signed; and he directed judgment to be entered for the plaintiff for 1*l.* and costs.

The Queen's Bench Division reversed the judgment of the county court judge, considering that as there were alternative rates the condition was just and reasonable, and that it protected the defendants from liability. (1)

The plaintiff appealed.

Webster, Q.C., and *Dodd*, for the plaintiff. The plaintiff's complaint is founded upon two grounds; first, there was a delay in the transit of the fish; secondly, the company ought not to have received the fish when they were not prepared to send it off. Such breach of duty and negligence do not fall within the exemption from liability contained in the contract; moreover the condition exempting the defendants was not a just and reasonable one within the meaning of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7. It is true that there was an alternative rate, but the mere existence of an alternative rate does not justify a clause exempting the company from all liability

(1) 9 Q. B. D. 230.

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

for negligence. The exemption in this case would exempt the company from liability for loss arising from even the wilful misconduct of their servants, and that cannot be reasonable: *Peek* v. *North Staffordshire Ry. Co.* (1), is an authority that a condition which would exempt the company from injury, however caused, was neither just or reasonable, and the words in the condition in the present case "for loss or damage" are as strong as the words "for the loss of or injury to" which were in that case. There are no doubt opinions of some of the judges in *Peek* v. *North Staffordshire Ry. Co.* (1), that the option to have the goods carried at another rate would make a condition reasonable which was otherwise not reasonable, but such was not adopted by the House of Lords in its decision. In *McManus* v. *Lancashire and Yorkshire Ry. Co.* (2), the Court looked to the condition itself in determining whether it was just and reasonable. The defendants rely on the case of *Lewis* v. *Great Western Ry. Co.* (3), where, there being an alternative rate, the condition in that case was held to be just and reasonable—but there the words "except for the wilful misconduct of servants," were imported into the contract, and the Court declined determining the question whether a condition would be reasonable which exempted the railway company from all liability, however occasioned, even though there was an alternative rate. That such a condition would not be considered reasonable is borne out by *Ashenden* v. *London and Brighton Ry. Co.* (4), and *Aldridge* v. *Great Western Ry. Co.* (5), and in *D'Arc* v. *London and North Western Ry. Co.* (6), it was held that an exemption "at owner's risk" did not cover an injury from delay caused by negligence of the company, even though the goods were carried at a rate lower than the ordinary one. Next the breach of duty complained of in this action was not covered by the exemption in the contract. There was a duty on the part of the company to warn the plaintiff of the block arising from the great glut of fish consigned for carriage before they accepted the plaintiff's fish: *Jarvie* v. *Caledonian Ry. Co.* (7), and

(1) 10 H. L. C. 473.
(2) 4 H. & N. 327; 28 L. J. (Ex.) 353.
(3) 3 Q. B. D. 195.
(4) 5 Ex. D. 190.
(5) 15 C. B. (N.S.) 582.
(6) Law Rep. 9 C. P. 325.
(7) 2 Scotch Sess. Cas. 4th Series, p. 623.

McConnachie v. *Great North of Scotland Ry. Co.* (1). The defendants accepting the plaintiff's fish to be carried by them as usual, when they knew that they were not in a position to carry them by trains which would arrive at Billingsgate at the usual time, was a cause of action outside the contract, and not protected therefore by the condition of exemption. If however, such cause of action was covered by the condition then such a state of things is a strong ground for saying that a condition, which protects the company from a loss by delay so caused, is unreasonable.

Gully, Q.C., and *C. A. Russell*, for the defendants. There was no duty on the part of the defendants to tell the plaintiff that the line was blocked. Their duty, if they received the goods, was only to carry and deliver them in a reasonable time. Then as to the reasonableness of the condition. The railway company are at liberty to contract with their customers against responsibility for any loss or injury from any negligence or bad regulations of the company or their servants, including even wilful neglect of such servants, provided an option is given to the customer of having his goods carried on other terms at a reasonable rate: *Simons* v. *Great Western Ry. Co.* (2), *McManus* v. *Lancashire and Yorkshire Ry. Co.* (3), and *Lewis* v. *Great Western Ry. Co.* (4) If such option were really given to the customer, then a condition, which might otherwise have been unreasonable, would be reasonable. In *Peek* v. *North Staffordshire Ry. Co.* (5) and *Ashenden* v. *London and Brighton Ry. Co.* (6) there was no option, and on this ground also was *Rooth* v. *North Eastern Ry. Co.* (7) and *Allday* v. *Great Western Ry. Co.* (8) decided. Next, the Railway and Canal Traffic Act, 1854, does not apply to loss from delay. The words of s. 7 with respect to the liability of a company are "for the loss of or for any injury done to" any goods, and they therefore do not comprise a loss from delay in the carriage of the goods. The language of this 7th section is in this respect similar to that of the Carrier's Act, 11 Geo. 4, and 1 Wm. 4, c. 68, s. 1, and that enactment has been held not to cover a loss in respect of delay in

(1) 3 Scotch Sess. Cas. 4th Series, p. 79.
(2) 18 C. B. 805.
(3) 4 H. & N. 327; 28 L. J. (Ex.) 353.
(4) 3 Q. B. D. 195.
(5) 10 H. L. C. 473.
(6) 5 Ex. D. 190.
(7) Law Rep. 2 Ex. 173.
(8) 5 B. & S. 903; 34 L. J. (Q.B.) 5.

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

delivery of the goods: *Hearn* v. *London and South Western Ry. Co.* (1)

[BRETT, L.J. In the present case the condition extends to "loss or damage by delay in transit, or from whatever cause arising." Therefore the company do not limit their protection to damage by delay, but extend it to a loss or damage from any cause. Then if the condition be void for any purpose is it not void altogether?]

It may be void so far as it limits the liability for loss of or injury to the goods, and yet not void for the protection against loss by delay, which is not affected by the Railway and Canal Traffic Act, 1854. *Beal* v. *South Devon Ry. Co.* (2) is nearly the only case in which the point might have been taken, but it was not necessary, as the Court held that the condition freeing the company from liability for loss from delay was not unreasonable.

Dodd in reply, cited *Doolan* v. *Midland Ry. Co.* (3)

BAGGALLAY, L.J. The appellant in this case, who is the plaintiff in the action, is a fish merchant carrying on business at Great Grimsby, and he and other fish merchants at Grimsby have been in the habit of sending by the defendant company fish to London for the Billingsgate Market. The ordinary course and practice appear to have been for the fish to be collected by the railway company in the afternoon, and to be despatched by them by one of two trains leaving Grimsby, the one about a quarter past eight and the other a quarter before nine at night, so that the fish arrived in London in time for the Billingsgate Market, at about five in the morning. The railway company offered to those fish merchants, who were disposed to accept it, terms of carriage of the fish at something less than the ordinary rates of carriage, provided certain conditions were acceded to; and a contract based upon that was entered into which was as follows. [The Lord Justice here read the risk note.] Upon the particular occasion, in April 1881, shortly before Good Friday, there was a very large quantity of fish, and, according to the statement in the special case, it was largely in excess of what had ever been sent before at that period

(1) 10 Ex. 793; 24 L. J. (Ex.) 180.
(2) 5 H. & N. 375.
(3) 2 App. Cas. 792.

of the season. The defendants, however, instead of refusing to accept the consignment, collected the fish of the plaintiff in the usual manner, but, by reason of the very large number of vans of fish which were at the station, the plaintiff's fish did not go off by either of the trains that night, and was not despatched until half-past three o'clock the following morning, and consequently arrived in London too late for the Billingsgate Market. I do not gather from anything in the special case that the fish was injured or damaged in any way, but simply that there was delay by which the market was lost. In my opinion our decision must entirely turn upon whether the condition attached to the carriage at the cheaper rate was one which was just and reasonable. But I will just advert to two views of the case put forward in the course of the argument—the one on the part of the plaintiff, and the other on the part of the defendants. It was suggested on the part of the plaintiff, that this was not a delay in the transit of the fish within the meaning of the contract, but a misconduct or failure to discharge a duty on the part of the railway company which was not covered by the contract. The complaint, it is said, which the plaintiff makes against the railway company, is that they did not give him due notice of the increase in the amount of fish to be despatched, but took his consignment as usual, and so let him into a trap, as it were, as far as regards the result. I cannot take that view of the case. I do not see any evidence of any unfair or, what may be called, wilful misconduct on the part of the managers of the company in this case. It was in consequence of the large over-supply of fish on that particular day that the sending of the fish was delayed, and therefore it appears to me that it is not a case outside the contract, but one which would be governed by it. Another view was put forward on the part of the defendants by Mr. Gully, who said that the case was one of delay in the transit, and that was not covered by the Act of Parliament. Consequently the liability for it was the mere common law liability, and from that the defendants were relieved by the terms of the contract. In answer to a suggestion that the contract was not confined to protection in respect of delay in transit, but extended to protection against all liabilities in respect of loss however occasioned, it was suggested by Mr. Gully that

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Baggallay, L.J.

the terms of the contract might be divided, so that although one portion might be illegal, yet the other portion could be enforced. I am unable to adopt that view at all, for it appears to me that the contract is indivisible. Although no doubt in the risk note there are the words, "by delay in transit or from whatever other cause," the way in which the undertaking is given is "I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage." It is a single provision, and the question is whether the contract created by the two letters is one which this Court can deem just and reasonable. Up to the present time, so far as I am aware, no case has ever decided that if an alternative mode of forwarding is offered, and if either of the modes is a reasonable mode, the condition must be considered reasonable. Had there in the present case been no alternative mode of carriage, besides that which is provided for by this contract, I think it could not be doubted that the complete freedom of the company from liability in respect of loss or damage would be unreasonable. But even where an alternative is offered, it appears to me that each case must be regarded with reference to its special circumstances. Now here it is shewn that not only the plaintiff, but other merchants, have been in the habit of availing themselves of this particular mode of sending their fish to London, subject to this special contract, and they have found it to their advantage to do so. But then the question arises, have they in fact any option? If any of them were to forward their fish at the ordinary rates of carriage, it would be impossible for them to compete with other sellers of fish, who forwarded their fish at the lower rates of carriage, upon the special terms of this contract. Therefore it appears to me that practically they have no option, and consequently I hold that in this case the terms of the contract are not just and reasonable. At the same time I desire to guard myself against appearing to hold that a condition which exempted a railway company from liability however occasioned, including therefore the case of gross misconduct on the part of the company or of their servants, would, in any case, whatever might be the nature of the option given, be just and reasonable. My present impression is that it would not, but I do not think it necessary to express a definite

opinion upon that point now, because it appears to me that, having regard to the circumstances of this case, there really was no option as between the two modes of carriage which the plaintiff could adopt. I think therefore that this appeal must be allowed.

BRETT, L.J. In this case questions of considerable difficulty arise about which there have been differences of opinion. The point before us, I think, has never yet been decided by a binding authority, and, therefore, we must give our judgment according to our conviction. I do not think it necessary to enunciate the facts of this case, or to enter into any minute consideration of all the authorities which have been cited. The considerations with regard to them seem to me to have been exhausted during the argument. The first matter for our decision is what is the proper construction of the condition which in this case has been imposed by the company and accepted by the plaintiff. It was suggested that the condition might be construed so as to avoid the difficulties which have been started, but it seems to me that to do so, we should be altering its plain grammatical construction, and I do not think that is a legitimate mode of construction. I think that we are bound to construe this condition according to the ordinary grammatical construction of the words. Taking that to be so, and looking at the letter or notice of the company and its acceptance by the plaintiff (the two constituting the agreement between the parties), it seems to me that, according to the true construction of the language used, there is but one exposition or statement of absolution of the company, and that is that the company shall be absolved from all liability for loss or damage by delay in transit or from whatever other cause arising. I think it is one indivisible allegation of the condition imposed by the company as the condition on which they will carry fish, by which the company is absolved from any liability for loss or damage to the goods in transit from whatever cause arising, and it seems to me that it would absolve the company from any loss or damage to the goods arising by any negligence or any wilful act, not only of the company's servants properly so-called, but also of those who are not properly called the servants of the company, but who are the persons who carry

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Brett, L.J.

on the business for the company, as for instance the Board of Directors, so that, according to the construction of this condition, the company in reality do not undertake any legal responsibility of any kind which can be enforced against them. The question which then arises is, whether that is a reasonable condition. Now it is said that the Court must hold it to be reasonable, because there is what has been called an alternative rate, that is to say, that the company are willing to carry the goods at a higher rate upon the ordinary liability which would be imposed upon them, if there were no special conditions. It is said, as I understand, that the mere fact of the company being willing for a higher rate to carry the goods upon the absolute liability of common carriers, prevents the Court from saying that any condition is unreasonable, however large such condition may be, which the company imposes, if the party desires to have his goods carried at a lower rate. I am aware that in the argument in this case that was not pressed to its full extent, but I know that a very high authority, the authority of one from whose opinion I never differ without fear, does go to that length. Nevertheless, in *Lewis* v. *Great Western Ry. Co.* (1) I did venture to differ from what I thought was that extreme view, and after all the argument I have heard in the present case, I maintain what I said in *Lewis* v. *Great Western Ry. Co.* (1), that the mere fact of the company offering to carry the goods of a party on the ordinary liability at a higher rate, cannot *of itself* make any condition, which they impose, and which such party agrees to, upon a carriage of the goods at a lower rate, reasonable within the meaning of this statute.

Now I accept fully this, that the fact of there being an alternative rate (by which I mean a bonâ fide alternative rate) is a matter to be considered in determining whether the condition imposed upon the carriage at the lower rate is reasonable or not, and I agree that it may make a condition reasonable, which would not be reasonable if there were no alternative rate. But the question is whether it will make any condition, *however large*, reasonable. Now that partly depends upon what is the view one takes of what is called the option of a person who has goods to be carried by a railway company, that is to say, whether he has

(1) 3 Q. B. D. 195.

practically an option. By the powers given to railway companies by the legislature, and by what they have done under those powers, they have, as a matter of business, a monopoly of the carriage. In such a case as the present for instance, where fish is sent from a distant port to the London market, a party having to send to that market has really no option whatever. He must give up the London market, or he must send his fish by rail. Then what is the option which it is said the railway company offer to him. They give him the option of two rates by which he may send his goods, a higher rate or a lower rate, but he has no option but to send them by rail at the one rate or the other, if he is to do business at all. Then what is the offer which the company make to him? They say if you choose to pay the higher rate, we will carry on the Common Law responsibility, but if you do not choose to pay that, but a lower rate, we shall incur no liability whatever. So that he must pay the higher rate, or otherwise have nothing which he can enforce against the railway company at all.

Now obviously this railway company do not carry at the lower rate at a loss, they carry for payment at all events, and to my mind for a profitable payment, or they would not carry at all, and yet if this condition be held to be reasonable, they will not, though they are bailees for hire, have even the liability of a gratuitous bailee. The question is whether the Court ought to say that such is reasonable. I myself have no doubt in my own mind that a condition to carry under these circumstances, *without incurring any responsibility whatever*, is wholly unreasonable. But I also think that even though there is what is called an alternative rate, no condition can be reasonable which would lessen the liability of the railway company lower than that of a gratuitous bailee. Now if the railway company were in the position of gratuitous bailees, the obligation imposed upon them by law would be to take the same care as a reasonable owner would take of his own goods, that is to say, to take reasonable care in the choice of servants, and in giving reasonable instructions to such servants. They would not be answerable for any want of care or wilful misconduct of their servants, such servants being carefully chosen and reasonably instructed. Therefore it seems to me that they

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Brett, L.J.

would have a very large and ample protection, if they were allowed to make a condition to protect them to that extent, but were not allowed to make any condition to protect them beyond that. But the condition in the present case which would cover the case of an absolute want of care in the choice of servants, which would cover unreasonable and wrong rules of conduct for their servants, also a wilful delay by the authorities managing the railway, as well as a wilful delay for the benefit of the company, in the carriage of perishable goods to a market, is to my mind unreasonable. Then it is said that it is not sought in the present case to cover any one of those things by this condition. That is true; but I take it that where the condition is one and indivisible, if it would be unreasonable with regard to any state of circumstances which might be within reason possible, it is by the terms of the statute null and void; and if it be null and void, it is null and void to all intents and purposes, and therefore it is not material to inquire whether, as applied to the particular circumstances of this case, the condition would or would not be reasonable. Acting, as I do, upon the view which I took in *Lewis* v. *Great Western Ry. Co.* (1), I think that this condition is unreasonable, and consequently void. If void it follows, as a matter of course, as it seems to me, that the plaintiff is entitled to recover.

It was urged that a condition with regard to delay in transit is not within the statute, and that therefore where the parties have agreed to a condition respecting delay in transit, the Court cannot inquire whether it is reasonable or not. This argument was based upon the wording of the statute, which was said to be similar to that in the Carriers' Act (11 Geo. 4, and 1 Wm. 4, c. 68). The words are similar, but the subject-matter is different; and there is a latter part of the proviso of this 7th section which makes me think that the section covers the case of conditions with regard to delay in transit as much as it does the case of loss or damage to the goods. But even supposing that it does not, yet in this particular case where the condition is one and indivisible, and where it not only deals with a loss by delay in transit, but also with other losses which are admitted to be within the

(1) 3 Q. B. D. 195.

statute, and as to which it is void, it is, as it seems to me, void altogether.

Next it was said that the statute did not mean to protect people in the same way as some statutes protect sailors, infants, or young persons in factories or under disability. It is true that the people who are legislated for by the Railway and Canal Traffic Act, 1854, are not under the same infirmity for which those other persons are protected by those statutes, but they are under a similar infirmity on account of the monopoly of the railways and their inability to carry on their business except by sending their goods by the railway; and it seems to me that that infirmity of theirs is the very thing which the legislature has acted upon in the Railway and Canal Traffic Act, 1854, and which it intended to protect. I therefore am of opinion that this condition is absolutely null and void by the true construction of that statute, and the plaintiff is entitled to succeed. I may say this, that our decision does no more than put upon the railway company the obligation, that in case they desire protection, they must state distinctly what protection it is they want, and thereby enable the Court to say whether such protection is or is not reasonable. They fail when they endeavour practically to override the statute, and to take away the control of the Court by, as was admitted, intentionally using general words which cover everything and free them from every liability.

LINDLEY, LJ. I have come to the same conclusion, but not altogether upon the same grounds. The case is one of difficulty and importance, and therefore I have put my judgment in writing. The contract in terms covers, first, loss or damage by delay in transit; secondly, loss or damage from whatever other cause arising.

If loss or damage here means loss of the goods or damage to the goods, then, as this action is not brought for any such loss or any such damage, the contract affords no defence to the action, and the plaintiff will be entitled to succeed. It is by no means clear that the contract properly construed does not extend to any other loss or damage than a loss of the goods or damage to them. However the case has been argued both in the

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Lindley, L.J.

Court below and before us upon the assumption that the words "loss or damage" in the contract have a wider meaning, and extend to pecuniary loss to the plaintiff, although the goods themselves may neither be lost nor injured. Assuming this to be the meaning of the words, then the contract in terms purports to protect the company from all liability to the plaintiff in respect of whatever may happen to his goods from the time they are received by the company, and so long as they are under the company's care. The terms of the contract are so wide as to cover all degrees of negligence and all kinds of misconduct, even wilful misconduct, on the part of the servants and officers of the company, for which, but for the contract, the company would be liable. In my opinion it would be to depart from the words and true meaning of the parties to the contract, if it were construed restrictively, so as to exclude loss by the misconduct as distinguished from the negligence of the company's servants or officers. The course of decisions on contracts more or less similar to the one before us, convinces me that the railway company, at all events, really meant to exempt themselves from all liability when they caused the risk note to be prepared and lithographed for use in the form in which it is. If the contract is thus construed it covers the loss sustained by the plaintiff under the circumstances stated in the special case. Loss by delay in starting, or by receiving goods when they could not be forwarded, is either loss by delay in transit, or loss from some other cause. Upon this point the decision of the Court below appears to me to be correct.

The next question is whether the contract thus construed is binding on the plaintiff, bearing in mind that he had the option of sending his goods on other terms which were free from objection in point of law. The decisions which preceded and led to the passing of the Railway and Canal Traffic Act, 1854, go far to shew that the contract is not illegal at common law; and I assume it to be legal and binding, unless it is invalid by reason of the statute just mentioned. The 7th section of the statute is obscurely worded, and has led to much litigation; but after the decision of the House of Lords in *Peek* v. *North Staffordshire Ry. Co.* (1) that section must be treated as based

(1) 10 H. L. C. 473.

upon the assumption that there may be contracts entered into in writing by sane men of business and signed by them, which would be legal at common law, but which may, nevertheless, be unreasonable in the opinion of a Court of law. In other words, the legislature has declared that the test of what is reasonable in these cases is not what sane men of business sign, nor what a jury may consider reasonable, but what a Court or a judge may consider reasonable. An enactment of this kind is very anomalous; but whilst it stands, it appears to me, to prohibit a Court or judge from adopting as the test of reasonableness simply what men of business may choose to sign. The Act is based upon the assumption that practically men of business must sign whatever terms railway companies may impose; and the decision of this case and of all like cases must, in my opinion, turn on whether men of business who are offered an alternative of sending their goods at a maximum rate at the company's risk, or at a lower rate wholly at their own risk, and who adopt the latter alternative are really practically compelled to do so; for if they are, and if what they are compelled to agree to is unreasonable, they are within the mischief intended to be remedied by the Act, and are entitled to its protection. On the other hand, if they are not practically compelled to send their goods at the lower rate, the state of things presupposed by the statute will not exist; the mischief to guard against which the statute was passed will not have to be guarded against, and there being no compulsion one way or the other, the contract cannot be held unreasonable.

In the case now before the Court, the plaintiff was a fish merchant, sending his fish to market; and practically he was compelled to send his goods at the lower rate. It is true he was not compelled to do so by the defendants; but it is plain that unless the plaintiff sent his fish as cheaply as he could he would be undersold in the market by his competitors in trade. The exigencies of trade left him no choice. Practically he was compelled to send his goods at the lower rate in the same sense, though not in the same degree, as he was compelled to send his fish quickly by rail instead of more slowly by sea. Practically, therefore, the option offered him by the railway company, was no option at all. If this view be correct, it will follow that the

1882

BROWN v. MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Lindley, L.J.

contract in question must be regarded in the same light as any other contract which practically the plaintiff could not help entering into; and so regarded, it goes too far and must be pronounced unreasonable. The decision in *Lewis* v. *Great Western Ry. Co.* (1) is consistent with this view, and goes as far as in my opinion it is proper to go into cases of this description. Lord Bramwell's observations in that case, no doubt, go much further; but I cannot concur within the view he takes of the statute and of the duty imposed by it on the Court. Lord Blackburn's observations in *Peek* v. *North Staffordshire Ry. Co.* (2) are not addressed to a case such as this, where the exigencies of trade compel the carrier's customer to send his goods at the lower scale of charge. Lord Blackburn's observations are general, and are addressed to those cases in which the customer is practically free to adopt which alternative he likes. The decision in *Simons* v. *Great Western Ry. Co.* (3) is open to the same explanation. It did not appear there, as in my opinion it does here, that the plaintiff could not practically carry on his business without sending his goods at the lower rate of charge. It follows from the foregoing reasoning, that in my opinion such a contract as the one before us might be reasonable under other circumstances, than those with which we have here to consider, and I cannot go the length of my Brothers Baggallay and Brett, and say that such a contract must be unreasonable in all cases. I should consider it reasonable in all cases in which the customer was not practically compelled to adopt the lower rate. Under such circumstances I should follow Lords Blackburn and Bramwell, and the decision in *Simons* v. *Great Western Ry. Co.* (3)

It only remains to add, that the words of that part of s. 7 of 17 & 18 Vict. c. 31, which relate to the reasonableness of conditions and contracts, are wide enough to include conditions and contracts relating to detention and delay as distinguished from loss of or injury to goods; and that the present contract is so drawn that it is impossible to sever some of the words from the others and to hold it bad in part only and good for the rest.

For the reasons above stated, I am of opinion that the decision

(1) 3 Q. B. D. 195. (2) 10 H. L. C. 473, at p. 511.
(3) 18 C. B. 805.

of the Court below must be reversed, and judgment be entered for the plaintiff for the agreed damages, 1*l.*, and costs of the action and of the appeal.

Appeal allowed.

1882

BROWN *v.* MANCHESTER AND LINCOLNSHIRE RAILWAY CO.

Solicitors for plaintiff: *Rollit & Sons, for Rollit & Sons, Hull.*

Solicitors for defendants: *Cunliffe, Beaumont, & Davenport, for R. Lingard Monk, Manchester.*

W. P.

[IN THE COURT OF APPEAL.]

Dec. 21.

COOMBER, APPELLANT; THE JUSTICES OF BERKS, RESPONDENTS.

Revenue—Income Tax—Justices—Assize Courts—Police Stations—5 & 6 Vict. c. 35—16 *& 17 Vict. c.* 34—*Schedules A and B.*

11 QBD 14

The justices of a county, in the due exercise of statutory powers, erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there, and for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him and his successors for ever upon trust for the public uses or purposes of the county. The courts, police station, offices, and rooms formed one block of buildings, and were used for the administration of justice, and for police and public purposes. Parts of the buildings were also used for holding county and committee meetings, and various other occasional purposes, but no rent or profit was received or made in respect of the buildings, or any part of them:—

Held, affirming the judgment of the Queen's Bench Division, that the income tax was not payable in respect of the buildings under Schedules A or B of the Income Tax Acts.

Affirmed by H of L. 11 AC 52/[illegible]

APPEAL by the Surveyor of Taxes from the judgment of the Queen's Bench Division on a case stated by the Income Tax Commissioners under Part III. of 37 & 38 Vict. c. 16.

The special case is fully set out in the report of the proceedings before the Queen's Bench Division. (1)

The material facts are shortly these:—The justices of the County of Berks were assessed under Schedule A of the Income Tax Acts in respect of certain buildings described in the assessment as "assize courts, &c.," of the alleged annual value of 300*l.* The buildings so described comprised the county assize courts and the county police station, which formed one block of buildings within

(1) 9 Q. B. D. 17.

1882

COOMBER v. JUSTICES OF BERKS.

the same walls, and covered by the same roof, and were erected at the same time, though under different statutory powers. The land on which they were built was conveyed in 1859 under 21 & 22 Vict. c. 92 (the County Property Conveyance Act), to the then clerk of the peace to hold to him and his successors for ever upon trust for the public uses or purposes of the county. The erection of the buildings was pursuant to public general statutes, and the cost of building the courts was provided for by money borrowed upon mortgage of the county rates under 7 Geo. 4, c. 63, s. 11, and the maintenance of the buildings was provided for out of the county rates. Besides the assize courts, the block contained various rooms and offices for the judges, counsel, jury, witnesses, county treasurer, clerk of the peace, police, and other officers, also cells for the reception of prisoners, and a police dormitory and guard room. The entrance hall has been used as a polling station for the county elections, and in 1864 the officers of the Berks militia were allowed, upon special application to the Court of Quarter Sessions, to use the grand jury room as a mess room, and the basement floor as a kitchen during their month's training; also an amateur musical society has occasionally practised in the grand jury room, and the committee of management of the Berks Friendly Society has occasionally met in one of the committee rooms. On no occasion, however, has any payment or remuneration been received for the use of the buildings, or any part of them, and no profit whatever has been made out of them.

Since 1861 the entire charge of the whole block of buildings has been vested in the chief constable by a resolution of the Court of Quarter Sessions.

The county police station was erected under 3 & 4 Vict. c. 88, s. 12, on lands purchased by the justices, and the cost of the lands and of erecting the police station was provided by money borrowed on mortgage of the police rate.

The commissioners found as a matter of fact that neither the justices nor the clerk of the peace, nor the members of the constabulary, derived any benefit whatever by their use of the premises, which was solely official and for the purposes of duty, and that (except the clerk of the peace) they were not the owners or occupiers thereof.

The questions for the opinion of the Court were:

1. Whether the buildings were properly assessable to income tax?

2. If they were so assessable, were the justices chargeable with income tax in respect of them under Schedule A?

3. If the buildings were assessable and the justices not chargeable, whether the clerk of the peace or any other person was chargeable with such income tax?

4. If part only of the premises was chargeable, what part and who was to be charged, and under what schedule?

5. Whether the assessment could in law be maintained, or whether the commissioner's decision was under the circumstances lawful?

The Queen's Bench Division gave judgment for the respondents, the justices of the county. The surveyor of taxes appealed.

Nov. 30. *A. V. Dicey* (*Sir H. James, A.G.*, and *Sir F. Herschell, S.G.*, with him), for the appellant. The justices are liable to be assessed by virtue of 5 & 6 Vict. c. 35, which is enforced by 16 & 17 Vict. c. 34. These statutes are founded upon 43 Geo. 3, c. 122; but the later enactments have a wider operation than the earlier. The decision of the Queen's Bench Division is in effect that only profits or property of a profitable nature is taxable.

If the legislature had intended to exempt assize courts and police stations from assessment to the Income Tax Acts, it would have used express terms to carry out that object: see 5 & 6 Vict. c. 35, s. 61, No. VI. It is true that the Crown is not bound by any statute, if it is not named; but it may take advantage of any enactment, although it is not named therein: the object of the Income Tax Acts was to render all property in the occupation of a subject chargeable to the public revenue; and the Crown can proceed against any person in occupation of assessable property. It may be that assize courts and police stations are not rateable to the poor; but the Acts as to the poor-rate are not taxing Acts: they merely enable the inhabitants of certain localities to raise a fund for the support and relief of the poor. In the present case the Crown is not the owner, but the clerk of the peace is the legal owner; and the justices of the peace are substantially the owners,

1882

COOMBER v. JUSTICES OF BERKS.

or at all events they have the use and the occupation and the enjoyment; it is immaterial to consider whether they are equitable owners. In *Clerk* v. *Dumfries Commissioners of Supply* (1) it was held that police stations, which were constructed and supported entirely out of the police assessments for the county, were proper subjects of income tax under Schedule A.

[BRETT, L.J. In that case the Court appears to have held as a matter of fact, that there was an occupation by the commissioners of police; here the commissioners of income tax find, as far as they can, that there is no occupation by the justices.]

Such finding must be treated rather as a matter of law than of fact.

By 5 & 6 Vict. c. 35, s. 63, and under No. IX., which gives the rules for charging the duties under Schedules A and B, it is, inter alia, stated as follows: "Every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act, as the occupier of such lands or tenements," and by s. 70 of that Act, all lands, tenements, and hereditaments are to be assessed, whether they are occupied or not; the justices have the control of the buildings, and do in fact use them, and the object of the statutes is to tax the occupier, or at least the person having the use of the hereditament. Surely some person must be rateable in respect of the assize courts and police stations, and the police constables are not: *Bent* v. *Roberts.* (2)

The justices if not a corporation are, at least, a "society" within the meaning of 5 & 6 Vict. c. 35, s. 40. In the Queen's Bench Division reliance was placed upon the use of the word "profits," which occurs in the title of 5 & 6 Vict. c. 35; there is no ambiguity, if the title is left out of consideration; the statute is clear without the title, and the title cannot be taken as part of the Act. The question is not whether the occupier actually derives profits; but whether the property is in its nature capable of yielding a profit.

Money might be taken for the use of part of the buildings for concerts, and in that event the justices would be rateable to the poor: *Justices of Lancashire* v. *Cheetham.* (3)

(1) 7 Sc. Sess. Cas. (4th Series) 1157; S.C. *sub nom. Clerk* v. *Inland Revenue*, 17 Scot. Law Rep. 774.

(2) 3 Ex. D. 66.

(3) Law Rep. 3 Q. B. 14.

H. Matthews, Q.C., and *Gorst, Q.C.* (*H. D. Greene*, with them), for the respondents. The title of the Act 5 & 6 Vict. c. 35, is to be looked at, and it appears from that that the Act is to grant duties on profits arising from property, &c. Then 16 & 17 Vict. c. 34, s. 2, grants the duty under Schedule A in respect of the property in lands, and under Schedule B in respect of the occupation of such lands, but under both schedules it is to be charged according to the annual value of such lands. Now for arriving at what is the annual value, the Act by s. 5 goes back to 5 & 6 Vict. c. 35, where the rules for that purpose are given under s. 60, and on examining them it will be seen that the object of the Act is to get at the profits from the land and to tax such. The only machinery of the Act for taxing the owner is as appears from Order IX., rule 1, by charging the occupier with it, and leaving him to get the same repaid by the owner. The justices, who are the respondents in this case, are neither owners nor occupiers of these buildings. There is therefore no machinery in the Acts by which they can be reached, and consequently the Income Tax Acts do not apply. Next, the occupation of these buildings if by any one (being for such public purposes as those for which these buildings have been used), is exempt from the Income Tax Acts, on the same principle as it has been held to be exempt from the poor rates: *Mersey Docks and Harbour* v. *Cameron* (1); *Hodgson* v. *Local Board of Carlisle* (2); *Reg* v. *Justices of Worcestershire* (3); *Reg.* v. *Overseers of Manchester* (4); *Corporation of Worcester* v. *Droitwich Assessment Committee* (5), and *Justices of Lancashire* v. *Overseers of Stretford.* (6) The 64th section of 5 & 6 Vict. c. 35, directs the assessor, if no return has been made, or one with which he is dissatisfied, to estimate the annual value to the best of his judgment, and where the annual value cannot be otherwise ascertained, the annual value on which the poor rate has been made is to be taken as his guide; so it assumes therefore that the property in respect of which the tax is to be levied is property liable to the poor rate. The "use" mentioned in Order IX., which has been relied on by the appellant, as shewing that the justices are

(1) 11 H. L. C. 443.
(2) 8 E. & B. 116.
(3) 11 Ad. & E. 57.
(4) 3 E. & B. 336.
(5) 2 Ex. D. 49.
(6) E. B. & E. 225.

1882

COOMBER v. JUSTICES OF BERKS.

occupiers, is not a mere official use, such as the justices have of the buildings, but a beneficial one: *Bent* v. *Roberts*. (1)

Sir F. Herschell, S.G., in reply. These buildings are land owned by some one, therefore land in which there is property, and so within the taxing clause of the statute 5 & 6 Vict. c. 35.

[BRETT, L.J., referred to *Hare* v. *Overseers of Putney*. (2)]

That case only shews that there may be an owner where there is no occupier. Here the justices have the use of the buildings, and therefore by the statute are to be deemed occupiers. Suppose the building instead of being county property were hired by them at an annual rent, will it be said that then no one was taxable in respect of such rent.

Cur adv. vult.

Dec. 21. The following judgments were delivered:—

BAGGALLAY, L.J. This appeal has been brought under the following circumstances:—

The justices of the county of Berks, having been assessed, under Schedule A. of the Income Tax assessment for the parish of St. Lawrence, Reading, for the year ending the 5th of April, 1879, in respect of certain buildings, described in the assessment as "assize courts, &c.," of the alleged annual value of 300*l.*, appealed against such assessment to the commissioners for general purposes under the Income Tax Acts.

The buildings, so described as "assize courts," &c., comprised the County Assize Courts, and the County Police Station, which formed one block of buildings, within the same walls and covered by the same roof.

The commissioners, being of opinion that the assessment could not lawfully be maintained, discharged it, but, upon the application of the surveyor, stated a special case, for the opinion of the Queen's Bench Division of the High Court of Justice. The special case came on to be heard in the Queen's Bench Division on the 24th of March, 1882, when the decision of the commissioners was affirmed; from that decision the present appeal is brought.

The material statements in the special case are set forth in the

(1) 3 Ex. D. 66. (2) 7 Q. B. D. 223.

1882

COOMBER v. JUSTICES OF BERKS.

Baggallay, L.J.

report of the proceedings in the Queen's Bench Division (1), and I deem it unnecessary to refer to them, further than to note, that it appears, from such statements, that the assize courts and police station were erected at the same time though under different statutory powers; that the land on which they were built was conveyed, in 1859, under 21 & 22 Vict. c. 92, to the then clerk of the peace, to hold to him and his successors for ever, upon trust for the public uses or purposes of the county; and *that no profit or pecuniary benefit was derived from the use of the building.*

In the course of the arguments on the present appeal, the case of the *Mersey Docks and Harbour Board* v. *Cameron* (2), has been much discussed, and the principles, enunciated or recognised in the decision in that case, have been quoted and relied upon by both sides; fully recognising the important bearing which the principles so enunciated and recognised have upon the case now under consideration, I propose, in the first instance, to direct attention to the purport and effect of what was then decided.

The Mersey Docks and Harbour Board were constituted trustees by Acts of Parliament, and were specially appointed to have the control of certain docks and other property, vested in them as such trustees, in order to maintain those docks for the benefit of the shipping frequenting the Port of Liverpool, and the question, involved in the then appeal to the House of Lords, was whether they were rateable to the relief of the poor as occupiers of the docks. The previous decisions upon the Statute of Elizabeth (43 Eliz. c. 2), had been numerous, and by no means consistent, and the object of the appeal was to obtain a definite declaration of the principles on which the statute was to be construed. In answer to certain questions put to the judges by the Lord Chancellor, at the close of the arguments, Lord Blackburn, then Blackburn, J., on behalf of five of the six judges who attended, traced, in great detail and with great care, the progress of the decisions on the question of the liability to contribute to the relief of the poor of those occupiers of valuable property, who, in their own persons, derived no benefit from such occupation, or, in other words, occupied in a merely fiduciary character; and, after pointing out that, for a long series of years, when Lord Mansfield,

(1) 9 Q. B. D. 17. (2) 11 H. L. Cas. 443.

1882

COOMBER v. JUSTICES OF BERKS.

Baggallay, L.J.

Lord Kenyon, and Lord Tenterden presided in the Court of King's Bench, the current of authority was favourable to the exemption of such persons from liability to be rated, but that such decisions had been subsequently to some extent broken in upon, he referred to the case of the *Tyne Improvement Commissioners* v. *Chirton* (1), decided in the Court of Queen's Bench in 1859, as indicating what, in the opinion of himself and the other judges who concurred with him, was the principle upon which *alone* exemption from liability, upon the ground that the occupation was by bare trustees, could be maintained; viz., *that the property was occupied for the purposes of the government of the country.* In an earlier part of the answer, Lord Blackburn (2) had drawn attention to a long series of cases, which had established that no one was rateable in respect of the occupation of property which was occupied for the purposes of the government of the country, and that under that head were included *the police and the administration of justice,* and he had gone on to say that this rule applied not only to property occupied for such purposes by the servants of the great departments of of State, such as the Post Office, the Horse Guards and the Admiralty, in all of which cases the occupiers might strictly be called the servants of the Crown, but also amongst others to property occupied by local police and to *county buildings, occupied for the assizes and for the judges' lodgings;* as to which he made the following comment: "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but *the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government,* and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu. These decisions are uniform, and it was not disputed at the bar that the exemption applies so far." The views, thus expressed by Lord Blackburn, were adopted by the Lord Chancellor and Lords Cranworth and Chelmsford, by whom the appeal was heard.

In moving the judgment of the House, Lord Westbury, L.C.,

(1) 1 Ell. & Ell. 516; 28 L. J. (M.C.) 131. (2) 11 H. L. Cas. 464.

said (1), "the only ground of exemption from the Statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by the statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance) is sought to be exempted, on the ground that it is occupied by bare trustees for public purposes, *the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.*" Upon this point, Lord Cranworth expressed himself as follows: "The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. *On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt.* These decisions have, however, all gone on the ground, *more or less sound*, that these buildings might all be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country."

Applying the principles thus enunciated and recognised, the House of Lords held that the Mersey Dock trustees were liable to be rated to the relief of the poor in respect of their occupation of the docks, on the ground that such occupation did not come within the only class of exemption which the Act of Elizabeth, when properly construed, recognised.

But upon an application of the same principles to the occupation of the Berkshire Assize Courts and police station, the occupiers must be held entitled to exemption from liability to be rated to the relief of the poor, upon the ground that the occupation is for public purposes which, to use the language of the Lord

(1) 11 H. L. Cas. 504.

1882

COOMBER v. JUSTICES OF BERKS.

Baggallay, L.J.

Chancellor, "are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown;" that this view has been acted upon appears from the statement in the special case, that the block of buildings comprising the County Assize Courts and the County Police Station, has not, nor has any part thereof, ever been assessed to the poor rates. If then the justices are to be regarded as the occupiers of the assize courts and police station, a view however to which they do not assent, and if, as such, they are not rateable to the poor-rate in respect of such occupation, on the ground that their occupation is for the purposes of the government of the country, as explained in the Mersey Dock Case, the question at once suggests itself, why should they be assessed in respect of the same premises to the income tax. This brings me to a consideration of the provisions of the Income Tax Acts.

By the statute 42 & 43 Vict. c. 21 the income tax for the year commencing on the 6th of April, 1879, is charged upon the property profits and gains, made taxable by the statute 16 & 17 Vict. c. 34; and, by s. 5 of the latter Act, the duties are to be assessed and raised under the regulations and provisions of the statutes 5 & 6 Vict. c. 35. Consequently, we have to look to 16 & 17 Vict. c. 34 for the subject matter of the tax, and to 5 & 6 Vict. c. 35 for the mode in which it is to be assessed and raised.

First, then, as to the subject matter of the charges to be made. For the purpose of classifying and distinguishing the several properties profits and gains, for and in respect of which the duties are granted by 16 & 17 Vict. c. 34, the duties are classified under five several schedules, marked respectively A, B, C, D, and E, of which schedules A and B are in the following terms:

"*Schedule A.* For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof," and *Schedule B*, "For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof."

It is immaterial to our present purpose to refer to the other schedules, save only to notice that they, as well as Schedules A and B, indicate that the subject matters of charge are such as are productive of benefit to the persons who are to bear the charge. Grove, J., in the course of his judgment in the Queen's Bench Division (1), is reported to have said, in reference to these schedules, "the language tends to shew that the tax contemplated is a contribution to the revenue of the country in respect of annual profit or benefit," and again, "the object which the statute aims at is to make each person pay the tax according to the aid he may receive either from his property or from his labours in a profession, trade, or employment." In the views so expressed I entirely concur. Let us now turn to the statute 5 & 6 Vict. c. 35, and note the mode which is provided for assessing the property thus made chargeable; s. 60 provides that the duties in Schedule A are to be assessed and charged under certain rules, which are arranged under separate consecutively numbered headings.

The heading No 1 is in the following terms:

"General rule for estimating lands, tenements, hereditaments, or heritages mentioned in Schedule A;" and the rule is as follows: "The annual value of lands, tenements, hereditaments, or heritages charged under Schedule A shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment; but, if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments, or heritages *capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed* and of whatever value, except the properties mentioned in No. 2 and No. 3 of this Schedule." It is immaterial to notice those exceptions.

The heading of No. 9 is entitled: "Rules for charging the said duties under Schedules A and B." There are three rules under

(1) 9 Q. B. D. at p. 26.

1882

COOMBER v. JUSTICES OF BERKS.

Baggallay, L.J.

this heading, the first and second of which are as follows: "*First*, the said duties, except where other provisions are made as aforesaid for estimating particular properties, shall be estimated according to the general rule contained in Schedule A, and *shall be charged on and paid by the occupier for the time being*, his executors, administrators, and assigns. *Second.* Every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act, as the occupier of such lands or tenements." And s. 70 of the statute 5 & 6 Vict. c. 35, provides that "the several duties shall be assessed on all lands, tenements, and hereditaments, whether occupied at the time of assessment or not," but that the assessments on houses shall be discharged for the period they are unoccupied.

The counsel for the appellant insist that the portions of the several Income Tax Acts to which I have referred, establish the liability of the justices to be assessed to the income tax in respect of their alleged occupation of the assize courts and police station, but I am unable to adopt this view. Even if it is to be assumed, as contended on behalf of the appellant, that the premises in question were, at the date of the assessment, *in the beneficial occupation of the justices*, there is nothing in the Income Tax Acts to negative, or even to throw a doubt upon, the proposition which I have already advanced, that the purposes for which they were so occupied, were public purposes of a kind, which according to the authorities cited by Lord Blackburn and recognised by the Lord Chancellor and Lord Cranworth, in the Mersey Dock Case (1), entitled them to exemption. The provision in rule No. 1, that it shall be construed as applying to lands and tenements "for whatever purpose occupied or enjoyed" has been relied upon; but, the Crown not being named in the Act, such a provision is inoperative as regards the Crown, or as regards the servants of the Crown, strictly so-called, or as against those occupiers for public purposes to whom the life benefit of exemption is accorded as is accorded to the servants of the Crown, strictly so-called.

For the reasons, which I have assigned, I am of opinion that

(1) 11 H. L. Cas. 443.

the appellant has failed to establish the liability of the justices to be charged with income tax in respect of the County Assize Courts and County Police Station, and that this appeal ought to be dismissed.

But some propositions have been pressed upon us in argument, which I desire not to pass over.

I assent to the proposition that, in order to establish a liability to the charge, it is not essential that there should be a beneficial ownership or occupation; but if the ownership or occupation is not beneficial, the property must, in my opinion, be capable of being made a source of benefit to the owner or occupier.

Again, as at present advised, I adopt the view, which has been pressed on us on behalf of the appellant, that the justices must be regarded as the occupiers of the premises within the meaning of the statutes, as having the use of them, but I deem it unnecessary to express a positive opinion upon the point.

I am, however, unable to assent to the proposition that there is any beneficial occupation of the premises by the justices, or that the premises are capable of beneficial occupation or enjoyment by any one. In any view of the case, it can hardly be disputed that the justices have not any present beneficial occupation or enjoyment of the premises; and inasmuch as, by virtue of the statute 21 & 22 Vict. c. 92 and of the conveyance made thereunder in 1859, the assize courts and the police station were on the 6th of April, 1859, and have ever since been, vested in the clerk of the peace, upon trust for the public uses or purposes of the county, they have been and are incapable of any such beneficial ownership or occupation as could render the owner or occupier liable to be charged in respect thereof.

There is but one more suggestion, it can hardly be called an argument, on behalf of the appellant, to which I will advert; it was urged before us, and it was apparently urged in the Divisional Court, that, if the legislature had desired to exempt assize courts and police stations from the operation of the Acts, they would have been included amongst the exemptions mentioned in or provided for by 5 & 6 Vict. c. 35. This suggestion may be met by another of, at least, equal materiality. If it was intended that justices should be charged in respect of this

1882

COOMBER v. JUSTICES OF BERKS.

description of property, it is somewhat strange that, from the year 1842, when the 5 & 6 Vict. c. 35 was passed, until the year 1879, no attempt was made to enforce or even assert any such liability.

The costs of the appeal must, of course, follow the result.

BRETT, L.J. During the argument I confess I was under the impression, an impression which has not been removed, that even if everything else was in favour of the Crown it was impossible that this assessment could be upheld, upon the ground that the persons assessed are the justices. Mr. Dicey, I think, hardly urged that they could be assessed, and what he asked the Court to determine was, not whether the justices could be properly assessed, but whether anybody could be assessed, viz., whether in fact the property here was assessable property. The reason why I think it impossible to hold that the justices can be assessed is that the justices are not a corporation, nor are they an association of persons at all unless they be assembled in quarter sessions. The justices have no property belonging to them as justices upon which anything could be levied, and it can hardly be maintained I should think that this tax could be recovered from them individually and personally. Therefore it seems to me that this assessment must, in any view of the case, fail, and that the judgment must be for the respondents. But we have been asked to give an opinion as to whether the clerk of the peace, or some other person, might not be nominally and legally assessed for this tax in respect of these buildings. I am of opinion that nobody can be assessed to this tax in respect of these buildings. I think it impossible at this time to re-open the question as matter of law whether these buildings are to be considered, not as Crown property properly so called, but as property which, on account of the purposes for which it is used, is to be treated as in the nature of, that is to say, as if it were Crown property. It would be impossible now after the long series of decisions and the long lapse of years for any Court to hold, whatever it might have been ready to hold if the matter had been new, that buildings in the position of these buildings could be assessed to the poor-rate, and it would be impossible to say that it was not a good ground

of exemption that they are considered in point of law to be, in the sense in which I have explained, in the nature of Crown property. That was enunciated without objection to be the law in the opinion of Lord Blackburn, then Blackburn, J., given to the House of Lords in the *Mersey Docks* v. *Cameron* (1), and which as to that point was adopted by the Lords in their judgment. Now it seems to me that that is the only application which that case has to the present one. If then these buildings are exempted from rating to the poor rates on the ground that they are buildings in the nature of Crown property, is it possible to say with regard to the Income-tax statutes that they are not equally buildings in the nature of Crown property? I think it is not, and therefore on that ground not that these buildings are Crown property, but that they are in law considered on account of the purposes to which they are applied as in the nature of Crown property, it follows that they are exempt from the Income Tax Acts by reason of that privilege. That of itself would be sufficient to decide the case, but it seems to me that there are other and strong reasons why it ought to be held that this property is not assessable under these statutes. Mr. Dicey ingeniously asked us to divide the argument into two heads, and to consider the matter under one head without any reference to the other. He asked us to consider whether this property was assessable without at the same time considering who, if anybody, could be assessed in respect of it. It was so put in order to avoid the difficulty of determining who could possibly be assessable in respect of this property. The immediate result of so considering it was laid bare by the proposition put forward on behalf of the Crown that every foot of land in this kingdom, whatever the circumstances under which it exists, is assessable to this tax. Of course, if the matter be considered without reference to anything else, every foot of land is assessable. But it seems to me that in order to decide this case we are bound to consider whether under any circumstances such as we have a right to suppose might exist, it is possible to apply the machinery of the statutes to the buildings in question, and if it is not possible to do so, then it seems to me to follow that these buildings are not assessable. Now, the

(1) 11 H. L. C. 443.

1882

COOMBER v. JUSTICES OF BERKS.

Brett, L.J.

Income-tax statutes no doubt begin by saying that all lands are to be assessed; but then the question is in respect of what are all lands to be assessed? The statutes say "in respect of the annual value thereof." Therefore if there be any land in this kingdom which cannot under any circumstances have any annual value, it is obvious that the tax fails at once to attach to such land, for though it is land there is nothing in respect of which the tax can be imposed. In my opinion, the buildings in question in this case, are land which cannot under any circumstances, which we have a right to consider, have any annual value whatever. They can have no more value than if they were a barren rock, which could not under any possible circumstances, have any annual value. They were erected under the authority of an Act of Parliament, which declares that nobody shall legally ever enjoy any benefit from the use of them. It is true to say that some person might take these buildings, and by breaking the law and disregarding the statute, obtain an annual value from them. If such a person so breaking the law were to be in possession of these buildings, and to obtain a profit from them, he could not be heard to say that by Act of Parliament he had no right to do so, and therefore he would not pay the tax. He could not be allowed to set up his own wrongful act, and therefore under those circumstances, he might be assessable; but as long as these buildings are used legally according to the Act of Parliament, not only cannot the justices have any benefit from the use of them, but nobody can; for the statute is express that nobody is to have any benefit from the use of them. It seems to me that we are not entitled until the fact actually arises to consider that anybody will break the law, and that we must consider these buildings as being as they are under such a legal disability, as that nobody can receive any benefit from the use of them. It follows that they are by law struck with sterility as to their annual value, and that, as long as the law is observed they cannot have any annual value in the hands of anybody. If so, there is nothing upon which the Income-tax statutes can act.

But more than that, it seems to me that as long as these buildings are used legally there cannot be any occupier of them. That there could be any occupier of them in the ordinary sense

of the word "occupier" is hardly contended; but it is said that the word "occupier" in the statute is enlarged by the language in the schedules A and B of 5 & 6 Vict. c. 35, so that anybody who has the use of them is an occupier. That phraseology in those schedules gives rise to some difficulty. It cannot really mean that anybody who has the use of the buildings is an occupier within the meaning of the Act of Parliament. It cannot mean that the judges who sit in the assize Courts, or the witnesses, the public, or the prisoners, all of whom in a sense use these Courts, are the occupiers. It is absurd to suppose that it means that. It cannot mean that a person, who is there as a mere servant, is a person who has the use of them so as to be such occupier, because if so, then in every house, though the master be living in it, it might be said that each servant had the use of the house within the meaning of the statute and was a person who could be assessed. The person who has the use of the house within the meaning of the statute is the person who, though from some technical difficulty, he might not be called an occupier, has the same use of the house as the occupier of a house has. Now the justices have no such use of these buildings; nor the judges, nor have the inhabitants of the county, nor the public, nor the servants, if there be servants, who have to take care of them, nor the policemen, if there be any, who have to sleep in them for the purpose of doing their duty. As long as these buildings are legally used there is no person who can have the use of them in such a manner as to be the occupier of them within the meaning of the Act of Parliament. If that be so, there is nothing in these buildings upon which the machinery of the Act can under any circumstances, as long as they are legally used, be brought to bear. Therefore I decline to consider this case as to the property itself alone. I say that it must be considered with regard to the property itself and with regard to the persons who would under proper circumstances be made liable to assessment; and if you find that taking those two together this property is in such a position that the machinery of the Act can never be applied to it, it follows logically that the Act does not apply to it, and it cannot be assessed. Therefore I am of opinion that our judgment ought to be for the respondents.

1882

COOMBER v. JUSTICES OF BERKS.

LINDLEY, L.J. I am of the same opinion, and have nothing to add.

Judgment for the respondents.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Newman, Stretton, Hilliard, & Williams, for J. T. Morland, Abingdon.*

W. P.

1883

Feb. 22.

RE CAINE.

Married Woman—Husband and Wife—Conveyance of Wife's Property under 3 & 4 Wm. 4, c. 74, s. 91—Dispensing with Husband's concurrence.

Where a husband and wife were living apart and, the wife being devisee under a will of real property on trust for sale, the husband refused to concur in a conveyance of such property upon a sale under the trusts of the will, unless he received a sum of money for doing so, the Court granted an order dispensing with the concurrence of the husband under 3 & 4 Wm. 4, c. 74, s. 91, although it was admitted by the affidavit that the husband had, since he had left his wife, to a slight extent contributed to her support.

APPLICATION for an order dispensing with the concurrence of the husband in a conveyance of real property by a married woman. The affidavit of the married woman stated that her husband, James Caine, had left her some years ago and had lived apart from her ever since, and that he had in a very small manner contributed to her support since, but that she had otherwise wholly maintained herself. It further appeared that Mrs. Caine was, before she married James Caine, the widow of one Cockaigne, who had by his will devised to her real property on trust for sale, and to stand possessed of the proceeds on certain trusts. It did not appear from the affidavit what the trusts of the proceeds of sale were; counsel, however, stated in moving that the applicant was herself to some extent a beneficiary under the trusts, but that others were also interested. It further appeared that Mrs. Caine, after her marriage to James Caine, sold the property under the trusts of the will, and conveyed the same to the purchaser, but her husband did not concur in such conveyance. The purchaser mortgaged the property to a building society, and the society were now proposing to sell under their power of sale as mortgagees, and could not make a title in consequence of the husband's

not having concurred in the former conveyance. Mrs. Caine, on being applied to by the society, expressed her willingness to execute any further assurance of the property that might be necessary to complete the title, but her husband refused to concur in any deed unless the society paid him 50*l*. Under these circumstances application was made for an order enabling Mrs. Caine to execute a deed confirming her former conveyance without the concurrence of her husband.

Dodd moved for an order accordingly. It has no doubt been held as a general rule that the affidavit should state that the husband does not contribute to the wife's support, whereas in the present case it appears that the husband has contributed to some extent to the wife's support since he left her; but it is contended that there must be exceptions to that rule. The cases seem to shew that where, as in the present case, the husband is guilty of misconduct and is seeking to take advantage of his position to extort money, the Court will make the order: *Re Woodcock* (1); *Re Perrin.* (2) In the present case the wife holds the property as trustee, and the case therefore stands on a different footing from cases in which the property is not trust property. The 91st section of the Act for the Abolition of Fines and Recoveries, 3 & 4 Wm. 4, c. 74, does not make it a condition precedent to the order that the husband does not contribute to the wife's support, but only that he shall be living apart from his wife; it is therefore clear that the Court has power to make the order, if in their discretion they think fit to do so, and it is submitted that under the circumstances a sufficient case has been made out to induce the Court to grant the application.

THE COURT (Huddleston, B., and North, J.), made the order as prayed. (3)

Order as prayed.

Solicitors for the applicant: *Chester & Co., agents for Chew & Sons.*

(1) 1 C. B. 437.
(2) 14 C. B. 420.
(3) See *Ex parte Fish*, 9 C. B. (N.S.) 715; *Ex parte Robinson*, Law Rep. 4 C. P. 205.

E. L.

1883
Feb. 24.

LOWE *v.* HOLME AND ANOTHER.

Practice—Costs—Judgment, Form of—Claim and Counter-claim.

The plaintiff's claim being for the balance of the contract price of work done, after giving credit for money paid on account, the defendants by way of set-off and counter-claim claimed in respect of the inferiority and defective character of the work. The action being referred for trial to an official referee, he found by his report that a balance of 32*l.* 18*s.* 6*d.* remained due to the plaintiff on his claim in respect of the contract price of the work, and that 34*l.* 10*s.* 6*d.* was due to the defendants on their counter-claim:—

Held, that the proper judgment on these findings was that the defendants do recover the balance of 1*l.* 12*s.*, and the costs of the action, on the ground, either that the inferiority of the work, though pleaded by way of counter-claim in form, in reality amounted to a defence, or that, even if the plaintiff were technically entitled by the findings to the costs of the action, the Court ought to interfere under Order LV., Rule 1, and give the costs to the defendants who had substantially succeeded in the action.

MOTION on behalf of the plaintiff to enter judgment upon the report of an official referee to whom the action had been referred for trial under the 57th section of the Judicature Act, 1873.

The plaintiff claimed 131*l.* 18*s.*, as a balance due to him in respect of work done for the defendants after giving credit for various payments on account.

The defendants, in their statement of defence, alleged that the contract price of the work done was 587*l.* 0*s.* 2*d.*, and that, after deducting the amounts credited by the plaintiff, a balance of 12*l.* 0*s.* 2*d.* only remained, and by way of set-off and counter-claim they alleged that, by reason of the imperfect and negligent and improper way in which the plaintiff did the work, and the bad and improper materials used by the plaintiff therein, the defendants had to provide materials and labour in and about the premises in having the same properly done and completed, and made payments and incurred expenses in respect thereof, and had to take up and re-execute portions of the work, and also had to do portions of the work which the plaintiff had omitted to do in the terms of his contract with the defendants, and that after giving credit to the plaintiff for the said sum of 12*l.* 0*s.* 2*d.*, there remained a balance due from the plaintiff to the defendants of

62*l.* 7*s.* 9*d.* The plaintiff joined issue and denied the statements of the counter-claim.

1883

LOWE v. HOLME.

The official referee, by his report, found that the plaintiff was entitled to recover from, and be paid or allowed by the defendants, in respect of the work done as mentioned in his claim, the sum of 32*l.* 18*s.* 6*d.*, and that the defendants were entitled to recover from, or be paid or allowed by the plaintiff in respect of their counter-claim by reason of the imperfect, negligent, and improper way in which the plaintiff did the said work, whereby the defendants had to re-execute portions of the same as in the counter-claim mentioned, the sum of 34*l.* 10*s.* 6*d.*, thereby leaving a balance of 1*l.* 12*s.* due from and payable by the plaintiff to the defendants, and that the defendants were entitled to judgment in the said action against the plaintiff for the said sum of 1*l.* 12*s.*

The motion made was that judgment should be entered upon the report either as follows, viz., that the plaintiff should recover on his claim 32*l.* 18*s.* 6*d.*, and costs of suit, and the defendants should recover on the counter-claim 34*l.* 10*s.* 6*d.*, and costs of the counter-claim, or as follows, viz., that the plaintiff should recover his costs of suit, and the defendants the balance of 1*l.* 12*s.*, with costs of counter-claim.

Bigham, for the plaintiff, moved for judgment accordingly. It appears from the case of *Baines* v. *Bromley* (1) that the correct mode of entering judgment in this case is as prayed for. In the case of *In re Brown, Ward* v. *Morse* (2) it was held by Chitty, J., that, where the plaintiff's claim and the defendant's counter-claim had both been successful, the plaintiff, in the absence of any special directions to the contrary, was entitled to the general costs of the action, notwithstanding that the result of the litigation as a whole was in favour of the defendants.

Gully, Q.C., and *W. R. McConnell*, for the defendants shewed cause. The cases cited do not apply. In *Baines* v. *Bromley* (1) the question was not how the judgment ought to be entered under circumstances such as those in the present case; but how, the judgment having been entered as now prayed for, the costs ought to be taxed upon it. The decision in the case of *Re Brown* (2)

(1) 6 Q. B. D. 691.

(2) W. N. Feb. 24, 1883, p. 31.

1883

LOWE v. HOLME.

does not apply to the present case where, though in form a counter-claim, the counter-claim is really available as a defence. The inferiority of the work to that contracted for was ground of defence by way of reduction of the price under the old system, and might have been given in evidence under a plea of never indebted. It can make no difference that the paragraphs setting out this defence are headed "counter-claim." The case is not analogous to one in which a wholly independent cause of cross-action is pleaded by way of counter-claim. It may be that in that case the plaintiff ought to have his costs of action, although the balance may be in the defendant's favour. In this case the defendants really succeed on the original claim. At any rate it is clear that this is a case in which under Order LV., rule 1, the plaintiff ought to be deprived of his costs, if he would otherwise be entitled to them, and made to pay the defendants' costs.

Bigham, in reply. This is not a case of set-off. The defendants are substantially bringing a cross-action, for they seek to recover, and have recovered, a balance from the plaintiff, which they could not do under the old set-off. The effect of the defendants' pleading by way of counter-claim instead of defence is that the plaintiff to resist a judgment against him must proceed with the action.

HUDDLESTON, B. I think we ought to enter judgment for the defendants for 1*l.* 12*s.* with costs. It seems to me that the view suggested by the defendants' counsel is correct. Before the Judicature Acts, where persons had cross rights of action, except in cases of set-off, each must proceed to bring his action, in which he would recover his costs if he succeeded and was by law entitled to costs. Since the Judicature Acts a defendant has been empowered to set up his cross claim to damages by way of counter-claim instead of bringing a cross action. And so the plaintiff and defendant have their respective claims considered in one action, and in cases of this sort I can quite understand that the rule may be that if the plaintiff gets a verdict on his claim he will be entitled to his judgment with costs of suit, and if the defendant gets a verdict for his cross-claim he will be entitled to his judgment and costs of his counter-claim. The cases cited to us by the plaintiff's counsel both appear to apply to that state of things.

1883

LOWE v. HOLME.

But the present case is altogether different. The learned referee here awards to the plaintiff a sum of 32*l.* 18*s.* 6*d.*, and to the defendants a sum exceeding that amount by 1*l.* 12*s.* He states the grounds of his finding to be that the defendants are entitled to recover the amount awarded to them from the plaintiff in respect of their counter-claim by reason of the imperfect, negligent, and improper way in which the plaintiff did the work contracted for. The plaintiff's original claim being 131*l.* 18*s.*, the referee finds that he is entitled to nothing, but that the defendants are entitled to 1*l.* 12*s.* from him. Under these circumstances this is not like a case of an independent counter-claim. It is one in which there is a defence to the claim on the ground of the defective performance of the work contracted for. But there is also another ground on which I think the defendants are entitled to judgment for the balance with the costs of action. It seems to me that this case certainly falls within the provisions of Order LV., rule 1, under which it is clear that the Court is enabled to award the costs to the party who has substantially succeeded. On these grounds it seems to me that the Court should order judgment to be entered for the defendants for 1*l.* 12*s.* with costs.

NORTH, J. I agree. The plaintiff's claim is in substance for work done, and the defendants' defence is that the work was so badly done that the plaintiff was already overpaid by what he had received. The question whether this was the case is what was dealt with by the learned referee, as appears from his findings. The decision in *Baines* v. *Bromley* (1), to which we have been referred, does not seem to me to apply to this case. The decision in that case referred to the proper mode of taxation upon a given form of judgment. Here the question is whether the judgment should not be entered as the defendants suggest. There the judgment as it actually stood was that the plaintiff recover against the defendants his costs of suit, and that the defendants recover against the plaintiffs 115*l.* 3*s.* 3*d.* on the counter-claim, and the costs of the counter-claim. On the taxation under that judgment

(1) 6 Q. B. D. 691.

1883

LOWE v. HOLME.

the master treated the case as one of a verdict for the defendants, and gave to them the costs of the cause. The question was, whether the taxation under that judgment was correct. Bramwell, L.J., in giving judgment, said: "I am of opinion that this appeal should be allowed, and I think so by reason of the judgment, which as entered in terms orders that the plaintiff recover his costs of suit. Both the master and the learned judge would have been right if the old rule, which is still in existence, was applicable, viz., that the party, in whose favour was the balance, recovered that with the costs of action. That, however, is not the judgment which was pronounced here; and it is enough for me to say that the taxation which has taken place cannot be supported having reference to that judgment." We are considering here, not the mode of taxation under a given judgment, but the form of judgment. The learned Lord Justice says that the old rule still exists, and I think that the form of our judgment in this case should be that the defendants recover the balance of 1*l.* 12*s.* with costs of action.

Judgment accordingly.

Solicitors for plaintiff: *Pritchard, Englefield, & Co., for John Leigh.*

Solicitors for defendants: *Morley & Shireff, for Snowball, Smith, & Co.*

E. L.

Feb. 1.

MOORE, PETITIONER; KENNARD, RESPONDENT.

SALISBURY ELECTION PETITION.

Parliament—Election Petition—Inspection and Discovery—Parliamentary Elections Act, 1868 (31 *&* 32 *Vict. c.* 125), *ss.* 2, 26—*Rules of Michaelmas Term,* 1868, *r.* 44.

In a parliamentary election petition the Court or a judge at chambers has no jurisdiction to make orders against the sitting member for inspection and discovery of documents.

ON a summons at chambers by the petitioner for an order against the respondent for inspection and production of documents, the application was referred to the Court.

1883

MOORE v. KENNARD.

The affidavit in support of the application stated that in the accounts of the Salisbury Parliamentary Election, 1882, delivered to the returning officer by the respondent's agent, there appeared the following items: "Clerks, messengers, and porters, 124*l.* 6*s.*; Mr. Bast, bill posting, 168*l.* 3*s.* 6*d.*; sandwich men and boys, 29*l.* 8*s.*," and a voucher duly signed of the payment of 124*l.* 6*s.*, "being the amount paid by me to clerks, messengers, and porters, employed in connection with the Salisbury Election, 1882," and similar vouchers for the other sums. It further stated that vouchers had been given to the respondent's agents by the messengers, bill-stickers, and porters referred to above, and also by other persons employed and paid in similar capacities; but that they had not been delivered to the returning officer, and were in the custody or control of the respondent. It further stated that the charge of bribery made in the petition was largely founded on the allegation that the respondent, by himself or his agents, colourably employed and paid a large number of voters nominally as messengers, bill-stickers, and porters, and that it was essential to support the allegations of the petition that lists of messengers, bill-stickers, and porters, and the receipts given by them, should be produced, and that the petitioners should have liberty to take copies thereof. The summons was for inspection of all documents shewing how the three sums above-mentioned were made up, and all documents relating to the hiring and payment of persons employed by or on behalf of the respondent as clerks, messengers, porters, bill-posters, sandwich men or boys, watchers, or in any other electioneering capacity at the election, and that the respondent should furnish their names, &c., and for discovery on affidavit of all documents relating to the election, and for liberty to inspect the documents so discovered.

Yarborough Anderson, in support of the motion. The vouchers and receipts of which discovery is asked ought, under the Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), s. 4, to have been delivered to the returning officer within two months after the election. The affidavit shews that this has not been done, and the petitioners can only obtain the information by such an

1883

MOORE v. KENNARD.

order as is sought for. It is admitted that no rule expressly relating to discovery has been made under the power given by the Parliamentary Elections Act, 1868, s. 25; but rule 44 of the Rules of Michaelmas Term, 1868, is a general rule applicable to proceedings such as discovery and inspection. (1) In the *Coventry Election Petition* (2) it was held that the Court had power to make an order for discovery of telegraphic messages; and in the *Stafford Election Petition* (3) an order was made by Blackburn, J., for inspection of vouchers.

Moulton, for the respondent, referred to *Wells* v. *Wren*. *Wallingford Election Petition* (4) but was not called on to argue.

POLLOCK, B. Looking at the decision in *Wells* v. *Wren* (4) I do not think it necessary to go at length into the reasons for our judgment. In that case the distinction was pointed out between what can now be done by the Court in election petitions, and what was formerly the practice of Committees of the House of Commons, and the new powers given by the Act are indicated. What is sought here is not within those new powers, and all that is not new is to be "subject to the provisions of the Act," that is (by s. 26) in accordance with the practice of Committees of the House. There is no case in which a committee ever made any order for production of documents or discovery. This may have arisen from the fact that a committee did not meet till the case came on before them, but whatever the reason we must look to the practice, and the practice being as I have said, it is sufficient for us to say that we have no power or jurisdiction to make this order. *Wells* v. *Wren* (4) applied to interrogatories, and this is an application for inspection, but there is no material difference between the two cases. The only importance of the present case arises from the fact that before *Wells* v. *Wren* (4) orders were made for discovery, no doubt as Lord Coleridge pointed out, because the effect of s. 26 was not

(1) "All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge who shall have the same control over the proceedings under the Parliamentary Elections Act, 1868, as a judge at chambers in the ordinary proceedings of the superior Courts; . . ."

(2) 19 L. T. 742.

(3) 20 L. T. 237.

(4) 5 C. P. D. 546.

called to the attention of the judges in the prior cases. This case is governed by authority and there must be no order.

1883

MOORE. v. KENNARD.

Manisty, J., concurred.

Order refused.

Agents for petitioners: *Kingsford, Dorman, & Co., for Stephen Hill, Salisbury.*

Agents for respondent: *Clarkes, Rawlins, & Clarke.*

A. M.

LENHAM AND OTHERS, PETITIONERS; BARBER, RESPONDENT.

Feb. 5.

HEREFORD MUNICIPAL ELECTION PETITION.

Muncipal Corporation — Election—Corrupt Practices — Time for delivery of Particulars—Corrupt Practices Municipal Elections Act, 1872 (35 & 36 *Vict. c.* 60).

In a municipal election petition the respondent applied for an order for delivery of particulars of the alleged corrupt practices:—

Held, that, in the absence of exceptional circumstances, the petitioners should not be ordered to deliver particulars more than seven clear days before the hearing of the petition.

MOTION by way of appeal from an order of a judge at chambers directing the petitioners to deliver to the respondent, fourteen clear days before the day appointed for the trial of the petition, particulars of the corrupt practices alleged therein.

The respondent was returned at the municipal election in November, 1882, as town councillor for the Monmouth ward of the city of Hereford. The petition alleged bribery, treating, and undue influence, the payment of canvassers, and the conveyance of voters, and particulars were asked for as to these matters.

A. G. M. McIntyre, for the petitioners. The order is too stringent in directing so long a period as fourteen days between the delivery of particulars and the trial of the petition; such an interval might be made use of for intimidation or tampering with the witnesses. It appears on affidavit that the ward is small, there are no exceptional circumstances, and a week would be

1883

LENHAM v. BARBER.

ample time for the respondent to examine the particulars. Further, the order ought to be limited by the insertion of the words "so far as is known." For both these alterations *Maude* v. *Lowley* (1) is an authority. [He also referred to *Green* v. *Hall.* *Oxford Election Petition.* (2)]

Coward, for the respondent. There is no reason for interfering with the discretion exercised by the judge at chambers as to the time to be allowed, and the allegation that witnesses may be tampered with is not a sufficient ground for diminishing the time: *Drogheda Petition.* (3) The words sought to be added to the order are not necessary, and were only inserted in *Maude* v. *Lowley* (1) because no objection was made.

POLLOCK, B. It would be very difficult to lay down anything amounting to a general rule applicable to all such cases as the present, nor do I desire to do so; but, on the other hand, it is desirable that some uniformity of practice should exist. Looking at the facts of the present case, it seems to me that fourteen clear days are not required by the respondent in which to consider the particulars. Looking also at the experience acquired in former cases, and to the absence here of exceptional circumstances, I think seven clear days are sufficient. Another point raised on this order is that it is too stringent, because the words "so far as is known" are not inserted in it. My practice has been to omit these words. They do not seem to me to be necessary, because the person who gives the particulars can only do so so far as is known, and if the words are inserted they might be taken as a warrant for unduly limiting the particulars. This part of the application to vary the order will therefore be refused.

MANISTY, J. I am of the same opinion. On the first point I agree that there should be some approximation to uniformity. Since 1880 there has been practical uniformity, and subject to exceptions seven clear days has been treated as generally sufficient. In this case I see nothing exceptional to make a departure from the general practice advisable. I also agree on the second

(1) Law Rep. 9 C. P. 165; 43 L. J. (C.P.) 103. (2) W. N. 1880, p. 146.
(3) 19 L. T. (N.S.) 528.

point. The only amendment, therefore, will be that seven clear days will be substituted for fourteen. 1883

LENHAM v. BARBER.

Appeal allowed.

Agents for petitioners: *Smiles & Co., for W. Boycott, Hereford.*
Agents for respondent: *Merediths, Roberts, & Mills, for E. L. Wallis, Hereford.*

A. M.

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lied. SYAL *v.* HEYWARD. [1948] 1 E.R. 576.

[IN THE COURT OF APPEAL.] 1882 *Nov.* 3

ABOULOFF *v.* OPPENHEIMER & CO.

Foreign Judgment—Fraud—Action in English Court.

A foreign judgment obtained by the fraud of a party to the suit in the foreign court cannot be afterwards enforced by him in an action brought in an English court, even although the question whether the fraud had been perpetrated was investigated in the foreign court, and it was there decided that the fraud had not been committed.

To an action claiming the value of certain goods and brought upon a foreign judgment, whereby the defendants were ordered to return to the plaintiff the goods or to pay to her their value, the defence alleged that the plaintiff obtained the foreign judgment by fraudulently representing to the foreign court that the goods were not then in her possession, and by fraudulently concealing from the foreign court that the goods then were in her possession and were concealed by her:—

Held, upon demurrer, that the defence was good.

CLAIM. 1. On the 9th of March, 1877, in a suit depending between the now plaintiff and defendants in the District Court of Tiflis in the empire of Russia, being a court of the said empire duly holden and having jurisdiction in that behalf, it was ordered by the judgment of the said Court, and according to the laws of the said empire, that the defendants should return to the plaintiff certain goods of the plaintiff, or in default that the plaintiff should recover their value amounting to 10,106 roubles, 76½ copeks, equivalent in English money to 1010*l.* 13*s.* 6*d.*, together with 428 roubles, equivalent in English money to 42*l.* 16*s.*, for costs and expenses, which sums the now defendants were by the said district court adjudged and ordered to pay to the now plaintiff, and the said judgment is still in force and unsatisfied.

1882

ABOULOFF v. OPPENHEIMER.

2. The defendants appealed against the said judgment to the High Court of Tiflis in the said empire, and on the 17th–29th of December, 1877, the said high court, being a court of the said empire duly holden and having jurisdiction in that behalf, confirmed the said judgment of the said district court, and ordered that in addition to the said sum of 10,106 roubles, 76½ copeks, and 428 roubles, the defendants should pay to the plaintiff the sum of 214 roubles, 75 copeks, equivalent in English money to 21*l.* 9*s.* 6*d.*, for the costs and expenses of the said appeal, which three several sums the now defendants were by the said high court of Tiflis adjudged and ordered to pay to the now plaintiff, and the said judgment is still in force and unsatisfied.

The plaintiff claims the said sums of 1010*l.* 13*s.* 6*d.*, 42*l.* 16*s.*, 21*l.* 9*s.* 6*d.*, making together the sum of 1074*l.* 19*s.*, with interest thereon at 6*l.* per cent. per annum from the respective dates of the said judgments until payment or judgment in this action.

Defence. 14. And for a separate and distinct defence, the defendants say that if the said judgments, or either of them were obtained as alleged (which is not admitted), the same and each of them were obtained by the gross fraud of the plaintiff and of her husband, Gregor Melcoevitch Abouloff, acting in collusion with her, in fraudulently representing to the said district court of Tiflis and the said High Court of Tiflis that the goods in question were not in the possession of the plaintiff and her husband at the time the said suit (if any which is not admitted) was commenced, and at the time the said judgment (if any) was given, and during the whole time the said suit (if any) was depending, and by fraudulently concealing from the said courts that the whole of the said goods were, as the fact was, and as the plaintiff and her said husband well knew, at the time the said suit (if any) was commenced, and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff and concealed by the plaintiff and her said husband, except as to so much of the goods as the plaintiff and her said husband had from time to time secretly and fraudulently disposed of.

Demurrer to the 14th paragraph of the defence.

The Queen's Bench Division (Mathew and Cave, JJ.) over-

ruled the demurrer and ordered judgment to be entered for the defendants.

1882

ABOULOFF v. OPPENHEIMER.

The plaintiff appealed.

Sidney Woolf, and *F. M. Abrahams*, for the plaintiff. It is for the defendants to establish that the judgments of the courts at Tiflis are rendered of no avail through fraud. It is consistent with the defence that the question as to the alleged fraud was investigated in the Russian courts and decided against the defendants. The mere averment of fraud is insufficient; facts must be stated shewing that it really existed: *Wallingford* v. *Mutual Society*. (1) No doubt a foreign judgment may be avoided by fraud: *Ochsenbein* v. *Papelier* (2); but in order to defeat it there must be fraud either in the proceedings of the foreign court or in the judges thereof: *Cammell* v. *Sewell*. (3) The case last-named strongly resembles the present. When an action is brought in an English court upon a foreign judgment, the merits of the case cannot be inquired into: *Bank of Australasia* v. *Niass* (4); for it must be taken that they were conclusively ascertained in the foreign suit. The judgment of a foreign court of competent jurisdiction imposes a duty or obligation on the defendant, which the courts of this country are bound to enforce: *Godard* v. *Gray* (5); *Schibsby* v. *Westenholz*. (6)

[LORD COLERIDGE, C.J. How does this case differ in principle from the *Duchess of Kingston's Case* (7)? There the question was whether the sentence of a spiritual court in a suit for jactitation of marriage was conclusive evidence upon an indictment for bigamy.]

The facts of this case cannot be tried over again in England; the defendants wish to show that the judgments of the Russian courts were wrong upon the merits. In *Flower* v. *Lloyd* (8) James and Thesiger, L.JJ., appear to have thought that an action to impeach a judgment obtained by fraud could not be sustained, although Baggallay, L.J., did not concur in this view. In

(1) Per Lord Hatherley, 5 App. Cas. 685, at p. 701.
(2) Law Rep. 8 Ch. 695.
(3) 3 H. & N. 617, at p. 646; (in Ex. Ch.), 5 H. & N. 728.
(4) 16 Q. B. 717.
(5) Law Rep. 6 Q. B. 139, 148.
(6) Law Rep. 6 Q. B. 155, 159.
(7) 2 Sm. L. C. 784, 8th ed.
(8) 10 Ch. D. 327.

1882

ABOULOFF v. OPPENHEIMER.

Crawley v. *Isaacs* (1) it was held that an Irish judgment could not be set aside upon the ground that it had been obtained by a false affidavit.

[BRETT, L.J. :—In that case it did not appear that the plaintiff herself, who sought to enforce the Irish judgment, had been guilty of any fraud.]

Benjamin, Q.C., and *Cohen, Q.C.* (*Horne Payne*, with them), for the defendants. The demurrer admits that the Russian courts have erred through the fraud of the plaintiff, and it would be unreasonable to allow her to succeed in an action brought in an English court. The objection to the foreign judgments is not based upon a mere infirmity of proof, or upon a wrong inference of fact; it is based upon a fraud which vitiates the whole proceedings. Even if the Russian courts had inquired into the existence of the fraud, and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court. A judgment obtained by the fraud of a party to the suit is no judgment. The question is, have the Russian courts been misled? If they have, the defendants are at liberty to show the true state of the facts: *Don* v. *Lippman*. (2) Fraud is against natural justice: it stands upon very different ground from mistake. To enforce a foreign judgment by an action in an English court is a matter of international comity only; can it be for international comity to carry out an admitted fraud?

[LORD COLERIDGE, C.J. In *Buchanan* v. *Rucker* (3) Lord Ellenborough, C.J., seems to have been of opinion that a foreign judgment obtained without giving to the defendant notice of the proceedings could not be enforced, it being against natural justice; but this view does not appear to have been approved of by the present Lord Blackburn in *Schibsby* v. *Westenholz*. (4)]

The opinion of the judges in the *Duchess of Kingston's Case* (5) would have been the same, even if the true state of the facts had been before the spiritual court in the suit for jactitation of marriage and had been disbelieved by the judge of that tribunal.

(1) 16 L. T. (N.S.) 529.
(2) 5 Cl. & F. 1, at p. 20.
(3) 1 Camp. 63.
(4) Law Rep. 6 Q. B. 155, at p. 160.
(5) 2 Sm. L. C. 784, 8th ed.

Further, from its very nature, the question, whether the Russian courts were misled by the plaintiff's fraud, never could have been submitted to them; and therefore they never could have decided upon it. The High Court of Justice will not be called upon to try any matter which has been already disposed of by the Russian courts.

Sidney Woolf, in reply. The defendants were bound to aver the existence of all the facts which set them free from the obligation created by the Russian judgments; and this they have failed to do.

The doctrine contended for by the defendants must be limited; upon their own shewing the Russian courts were mistaken and not misled.

LORD COLERIDGE, C.J. In this case we have to determine the validity of a demurrer to a statement of defence. The pleadings shew that an action was brought at Tiflis against the defendants, who were sued for the detention of certain goods. The district court and the High Court at Tiflis decided for the plaintiff, and awarded a return of the goods or the payment of damages. For the amount of those damages and of the costs of the proceedings in the Russian courts the plaintiff sues the defendants in the High Court of Justice in England, and she relies upon the judgments of those courts as giving to her good causes of action. The defendants pleaded that, if it is true that these judgments were obtained in the Russian courts, the goods in dispute were then in the possession of the plaintiff, who fraudulently concealed this circumstance from the Russian courts, who thereupon gave judgment for the plaintiff owing to her fraud.

It has been argued that the defence is bad, mainly on the ground that upon these pleadings it must be taken that these allegations of fraud were brought before the courts at Tiflis; that the defendants did state to those courts that the goods were not in their possession but in the plaintiff's; that the courts had jurisdiction to examine this defence, and did examine it, and came to a conclusion against the defendants; and therefore that, whether this conclusion was right or wrong on the matters of fact, the question of the plaintiff's alleged fraud cannot now be

1882

ABOULOFF v. OPPENHEIMER.

Lord Coleridge, C.J.

tried or litigated in the courts of this country. I may state the arguments for the plaintiff also in somewhat different words, namely, that although the Russian courts at Tiflis were led to decide against the defendants through believing a false state of facts to exist owing to the fraud of the plaintiff, nevertheless the defendants are not now at liberty to say that the judgments against them were procured by that fraud. Certainly this contention seems unreasonable. Many authorities, from the *Duchess of Kingston's Case* (1) down to our own time, have been cited during the argument, but not one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained. The justice of that proposition is obvious: if it were not so, we should have to disregard a well-established rule of law that no man shall take advantage of his own wrong, and we should have to lay down as a legal proposition that where a judgment has been obtained in the courts of a foreign country by a fraud and by a wrongful act, nevertheless the person obtaining it can take advantage of that fraud and of that wrongful act, and in the courts of this country can enforce the judgment so obtained. I do not think it necessary to inquire for the present purpose what is the strictly accurate mode of stating the principle, on which the courts of this country enforce the obligation created by foreign judgments. It has been stated by Parke, B., in *Williams* v. *Jones* (2), with the assent of Lord Blackburn in *Godard* v. *Gray* (3) and in *Schibsby* v. *Westenholz* (4), in one way, and it has been stated by Lord Brougham, in *Houlditch* v. *Donegall* (5), and apparently by other great authorities, in another. Non nostrum est tantas componere lites; it is enough for me to say that the English courts do enforce obligations created by judgments, but that it has always been held in the courts of this country to be an answer to an action upon a judgment, that that judgment has been obtained by the fraud of the party seeking to enforce it.

(1) 2 Sm. L. C. 8th ed. p. 784.
(2) 13 M. & W. 628, at p. 633.
(3) Law Rep. 6 Q. B. 139, at p. 148.
(4) Law Rep. 6 Q. B. 155, at p. 159.
(5) 2 Cl. & F. at p. 477.

This principle has been laid down in the broadest terms by De Grey, C.J., in the answer to the two questions of the House of Lords in the *Duchess of Kingston's Case* (1), namely, that "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." In that case one of the questions put to the judges was whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage was conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for bigamy; and speaking of this sentence De Grey, C.J., says (1): "Like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled." I believe that the principle has never been either better or more tersely and neatly stated than it was in the foregoing passages; and, as it appears to me, the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment. From the time of the decision in the *Duchess of Kingston's Case* (2) until the present time it has been held that fraud of that kind can be pleaded in the courts of this country to an action on a judgment, and that, if it can be proved, it vitiates the judgment and discharges the defendant from the obligation which would otherwise be thereby created.

I shall not go through the various authorities which have been cited before us; but I find the principle stated in the broadest manner by Lord Campbell, C.J., in *Bank of Australasia* v. *Niass* (3); and it is treated as a clear proposition by Lord Selborne, L.C., in *Ochsenbein* v. *Papelier*. (4) In the course of his judgment the Lord Chancellor cited a number of authorities, both text-writers and judicial decisions; and dealing with the observa-

(1) 2 Sm. L. C. 8th ed. 784, at p. 794.

(2) 2 Sm. L. C. 8th ed. 784.

(3) 16 Q. B. 717, 735.

(4) Law Rep. 8 Ch. 695.

1882

ABOULOFF v. OPPENHEIMER.

Lord Coleridge, C.J.

tions of the present Lord Blackburn in *Godard* v. *Gray* (1), on which there has been some comment and argument before us to-day, he gives his high authority for saying that Lord Blackburn did not intend those observations to conflict with this clear proposition.

An ingenious attempt has been made to take this case out of the general proposition, and to call in aid another equally clear proposition, namely, that the courts of this country in dealing with a foreign judgment will not inquire whether the foreign court pronounced a judgment correct in point of law, or right and accurate in point of fact, and that inasmuch as the defence now relied upon might have been, and perhaps was, brought before the foreign court which decided against the allegation of fraud, the foreign court, in the words of De Grey, C.J., was mistaken and not misled. The answer to that contention has been given in the course of the argument for the defendants. We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled, never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either re-trying or even re-discussing any question which was or could have been submitted to the determination of the Russian courts.

It has been suggested also that there ought to be some limitation as to the rule, that the obligation arising on the judgment of a foreign court can be annulled by the defence that the foreign court has been misled and not mistaken, if under any circumstances the fraud could have brought under the notice of the foreign court. I do not think that the general proposition, broad as it is, is to be subjected to any limitation of that kind; and I am of opinion that the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts necessary to be proved in the English courts were suppressed in the foreign court by the fraud on the part of the person who seeks to enforce the judgment which the foreign court was by that person misled so

(1) Law Rep. 6 Q. B. 139, 149.

as to pronounce. Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a Court, it seems to me fallacious to say, that because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled; it is plain that if it had been proved before the foreign court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was.

I think, therefore, on the broad ground that no man can take advantage of his own wrong, and that it is a principle of law that no action can be maintained on the judgment of a court either in this country or in any other, which has been obtained by the fraud of the person seeking to enforce it, that the defence is good, that the demurrer must be overruled, and that the judgment of the Queen's Bench Division was right.

BAGGALLAY, L.J. I agree in thinking that this appeal should be dismissed. The action has been brought to obtain payment of a sum of more than 1000*l.*, alleged by the plaintiff to be due to her from the defendants; and in support of her claim she relies on the judgments of certain foreign courts pronounced in an action to recover possession of goods alleged to be detained by the defendants, or in the alternative, to obtain payment of the value of the goods alleged to be thus detained. If the judgments had not been improperly obtained, the right of the plaintiff would be clear. In using the words "improperly obtained," I desire to be understood as not limiting them to a case where a fraud has been perpetrated upon the foreign court itself. I apply them also to a case where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based. In the present case it is alleged in the defence that so far from any goods of the plaintiff having been retained by the defendants, the goods were in her possession at the time when the action was commenced, remained in her possession during the progress of the action, and were still in her possession at the time when the judgment was pronounced, except so far as she might have secretly and fraudulently disposed of them. It is further distinctly stated in the defence that the plaintiff fraudulently

1882

ABOULOFF v. OPPENHEIMER.

Baggallay, L.J.

represented to the Russian courts that the goods were not in her possession, and that she fraudulently concealed the fact that the goods were in her possession at the time when the trial took place. I am unable to give any other meaning to these allegations than that the Russian courts were misled by the act of the plaintiff in making a fraudulent statement for the purpose of obtaining a judgment. It has been contended on the part of the plaintiff that having regard to the terms of the defence it is fair to infer that all the facts, so far as regarded the goods being in the possession of the plaintiff, were or might have been before the Russian courts, and that although they erroneously decided in favour of the plaintiff, they were mistaken and were not misled. If all the facts from which the fraud is to be inferred had been before the foreign court, and that court did not infer fraud from them, and if an English court was called upon to give effect to the judgment obtained by the person who perpetrated the fraud, I should be prepared to hold that that foreign judgment could not be enforced in the English court.

BRETT, L.J. In this case the claim asserts that a judgment was obtained in Russian courts by the plaintiff against the defendants, ordering that the defendants should return to the plaintiff certain goods of the plaintiff, or in default that the defendants should pay certain sums of money to the plaintiff. There is no allegation in the claim that the goods were returned; and I think that the true construction of it is that it in effect alleges that the goods were not returned to the plaintiff by the defendants, and that the money is payable by virtue of the judgment, and that that money is sought to be recovered by an action brought in an English court. To that claim the defendants have pleaded that which is alleged to be a perfect defence to the action. It is averred that that judgment was obtained by the fraud of the plaintiff in fraudulently representing to the courts "that the goods in question were not in the possession of the plaintiff and her husband at the time when the said suit (if any which is not admitted) was commenced, and at the time the said judgment (if any) was given, and during the whole time the said suit (if any) was depending, and by fraudulently concealing from the said

courts that the whole of the said goods were, as the fact was, and as the plaintiff and her said husband well knew at the time the said suit (if any) was commenced, and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff." That seems to me to be an allegation by the defendants, that for the purpose of obtaining the judgments upon which the plaintiff sues, a deception was practised by her upon the Russian courts, and that that deception was successful. The question is whether these allegations raise a good defence to an action brought in an English court.

The action, in which the present appeal is brought, was commenced in order to enforce an obligation acknowledged by the English courts. I do not stop to inquire why the English courts have recognised that obligation; but it is clear that if a judgment for the payment of a sum of money has been obtained in a foreign court, an action may be brought on that judgment in an English court, and judgment may be recovered upon it in England. The obligation, that is asserted in the English action against the defendant, is an obligation imposed on him by the judgment of the foreign court. I cannot help thinking that the same doctrine, which is now asserted with regard to a foreign judgment, would be applicable to an action brought on a judgment obtained in an English court, other than the court in which the action is brought. There may be a difference where it is sought to enforce by the process of a court a judgment of that very court, because if that judgment has been obtained by improper means, the objection does not arise in a new action brought on that judgment, but it arises with regard to the process of the court to enforce a judgment of its own. In a case of that kind it was perhaps formerly necessary to proceed in a court of Equity in order to get rid of the judgment, but I doubt whether it was necessary, because, at at least in my opinion, a court of Common Law would have, in the exercise of its own jurisdiction, set aside a judgment procured from it by deception.

With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold, according to the judgment of the House of Lords adopting the proposition laid

1882

ABOULOFF v. OPPENHEIMER.

Brett, L.J.

down by De Grey, C.J., that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it, the action in the English court will not lie. This proposition is absolute and without any limitation, and, as the Lord Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation.

So far the doctrine as to fraud was hardly disputed; but it was contended that it was consistent with the defence pleaded in this action that on the trial of the suit in the Russian courts it was asserted by the defendants that the facts now relied upon as shewing the plaintiff's fraud did exist, and that the defendants then gave evidence that the plaintiff was endeavouring to deceive the Russian courts. It is a very small matter to be considered whether these facts ought to have been alleged in the defence by the defendants, or whether they ought to have been asserted in the reply by the plaintiff, and the question has been fully argued before us whether, if the plaintiff's fraud was asserted by the defendants at the trial in the Russian courts, and if evidence in proof of it was given by them, they are now debarred from relying on the plaintiff's fraud as a defence to the present action. I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge: I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action. It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts, but I agree that the question whether the Russian courts were deceived, never could be an issue in the action tried before them. That question might be raised in the

1882

ABOULOFF v. OPPENHEIMER.

Brett, L.J.

Russian courts in order to determine the matters which were in issue; but I think it true to say that the judgment of Knight Bruce, V.C., in *Barrs* v. *Jackson* (1) does shew that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues therein raised. In the present instance, the issue in the Russian courts would be whether the defendants were wrongfully detaining the goods of the plaintiff. The question of fact whether the plaintiff had the goods in her possession at the moment when the action was commenced, would be a circumstance very material to be considered in order to determine that issue: but in the present action, upon this paragraph of the defence the only issue is whether the judgment of the Russian courts was obtained by the fraud of the plaintiff successfully perpetrated on those courts. The issues in the two actions are not the same; and therefore the defendants are not estopped from setting up in this action the same evidence that was adduced at the trial of the action in the Russian courts. I wish to say, however, that I am strongly of opinion that in the present action no question can be raised whether the judgment of the Russian courts was erroneous: it is immaterial to consider whether it was erroneous by reason of a wrong appreciation of the evidence or of the law, or by reason of frauds perpetrated on the courts by witnesses other than the plaintiff and her husband: the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it. Whether it can be rendered ineffective by want of jurisdiction or otherwise, is not a question before us.

With one exception, none of the authorities cited before us in the least militate against our decision; they all seem to shew that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by James, L.J., with the assent of Thesiger, L.J., in *Flower* v. *Lloyd*. (2) It seems to me that the

(1) 1 Y. & C. (C.C.) 585, at pp. 595, 597: on App. 1 Phil. 582.
(2) 10 Ch. D. 327.

1882

ABOULOFF v. OPPENHEIMER.

Brett, L.J.

fraud alleged in that action was probably fraud on the part of certain servants of the party, and not fraud brought home to the party himself; moreover it was, as I understand, fraud committed, not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. If it is to be taken that the doubts of James and Thesiger, L.JJ., related to a fraud of a party to the action, committed before the Court itself for the purpose of deceiving the Court, I cannot, after having heard the present argument, agree with the doubts expressed by them. These doubts are not binding, and no decision as to the effect of fraud was pronounced by these Lords Justices in *Flower* v. *Lloyd.* (1) In the present case we have had to consider the question fully, and, according to the best opinion which I can form, fraud committed by a party to the suit for the purpose of deceiving a foreign court, is a defence to an action in this country founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff, the result would be that a plausible deceiver would succeed, whereas a deceiver who is not plausible would fail. I cannot think that plausible fraud ought to be upheld in any court of justice in England. I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English Court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign court.

Judgment affirmed.

Solicitors for plaintiff: *Michael Abrahams & Co.*
Solicitors for defendants: *Emanuel & Simmonds.*

(1) 10 Ch. D. 327.

J. E. H.

[IN THE COURT OF APPEAL.]

1882
Nov. 6.

THE QUEEN (ON THE PROSECUTION OF THE PENARTH LOCAL BOARD) *v.* THE LOCAL GOVERNMENT BOARD.

Local Government Acts—Streets—Paving—Expenses, Recovery of—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257, 268—*Appeal to Local Government Board—Prohibition.*

Under 38 & 39 Vict. c. 55, s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, and, on his default the authority executed the work, and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made upon him for the amount.

Under s. 268, he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board, stating the grounds of his complaint.

On a rule for a prohibition to the Local Government Board:—

Held, that an appeal lay by the memorial to the Local Government Board, and that no prohibition ought to be granted.

APPEAL by the Penarth Local Board against the discharge by the Queen's Bench Division of a rule calling on the Local Government Board and George Taylor, to shew cause, why a writ of prohibition should not issue directed to them to prohibit them from further proceeding in the matter of a certain appeal by George Taylor, against a demand made upon him by the Penarth Local Board for payment of several sums amounting in the aggregate to 252*l.* 10*s.* 9*d.*, alleged to be due to him for private improvement works in respect of premises in Bradford Lane, and certain other streets within the parish of Penarth in the county of Glamorgan.

The facts are fully stated in the report of the proceedings before the Queen's Bench Division (1), and it is necessary here only to briefly recapitulate them.

On the 4th of May, 1881, the Penarth Local Board served on George Taylor and others, as the owners and occupiers of premises fronting, adjoining, or abutting upon a street called Bradford Lane, notice in writing under the Public Health Act, 1875, to level, pave, metal, flag, kerb, and channel the same within

(1) 9 Q. B. D. 600.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

twenty-one days. This notice not having been complied with, the Penarth Local Board executed the works and a written notice of apportionment, dated the 19th of September and signed by the surveyor of the board, was, on the 21st of September, 1881, served on Taylor, whereby the sum of 75*l.* 11*s.* 3*d.* was apportioned as his proportion of the expenses of the works. Similar notices were given as to the other streets. On the 20th of December, demands in writing were made on Taylor by the collector of the board for payment of the sums apportioned by the surveyor. Within twenty-one days from the 20th of December, 1881, Taylor presented a memorial to the Local Government Board, laying before it certain circumstances by which he felt himself aggrieved in connection with the demands for payment of sums amounting in the aggregate to 252*l.* 10*s.* 9*d.* He alleged that some of the work was unnecessary and the total sum was extremely heavy.

Nov. 3, 4, 6. *A. Charles, Q.C.*, and *A. T. Lawrence*, for the Penarth Local Board. First, no appeal will lie to the Local Government Board against the determination of a local board, except as to the mode in which the expenses incurred are to be met. By the Public Health Act, 1875, s. 150, an urban authority may either recover the expenses in a summary way or declare the expenses to be private improvement expenses; an adjoining owner may appeal against the decision of the urban authority either to recover the expenses summarily, or to declare them to be private improvement expenses; but upon no other ground will an appeal lie to the Local Government Board. The appeal of G. Taylor does not relate to the mode of payment. There can be no right of appeal against the original plans for the works.

Secondly, if *Cook* v. *Ipswich Local Board* (1) is to be taken as deciding that an appeal will lie generally to the Local Government Board, the appeal of G. Taylor is too late. In this point of view there are three decisions: first, when the urban authority has decided that a street must be paved; secondly, when the surveyor has apportioned the amounts payable by the adjoining occupiers and owners; thirdly, when the urban authority demands payment

(1) Law Rep. 6 Q. B. 451.

of the sums apportioned. If Taylor wished to dispute either of the decisions first mentioned, he ought to have appealed from it to the Local Government Board within twenty-one days; he could not afterwards dispute the validity of the notice to pave, nor could he afterwards contend that the work was unnecessary or its cost excessive.

[BAGGALLAY, L.J. Surely the urban authority is not entitled to proceed summarily before the expiration of three calendar months from the surveyor's notice of apportionment given to the adjoining owner, pursuant to the Public Health Act, 1875, s. 257.

BRETT, L.J. It follows from the argument now addressed to us, that an adjoining owner has three months within which he may dispute the apportionment as against the urban authority; but he must appeal against it to the Local Government Board within twenty-one days.]

The apportionment by the surveyor only determines the proportion of the expense payable by each adjoining owner according to his frontage; it does not decide the question of liability: *Hesketh* v. *Atherton Local Board* (1), and therefore a much shorter time is allowed for appealing against the cost of the work than for disputing the apportionment. It would be unreasonable to allow Taylor to appeal now to the Local Government Board, and to obtain a reduction in the amount apportioned upon him, when the other adjoining owners have acquiesced in the apportionment by the surveyor.

[BAGGALLAY, L.J. That argument appears hardly sustainable; for it has been decided in this Court that an award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expense of paving a street and an urban authority, by which the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not a party to the arbitration, so as to entitle the urban authority to recover from him the sum which would be due from him on the footing of the altered assessment: *Tunbridge Wells Local Board* v. *Akroyd.* (2)]

(1) Law Rep. 9 Q. B. 4. (2) 5 Ex. D. 199.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Adjoining owners who are called upon to pave a street, may, reasonably enough, wish the work to be done by the urban authority; for the urban authority can probably execute it at a cheaper rate; but it cannot be within the scheme of the Public Health Act, 1875, that any part of the cost of paving the street in front of the premises of one adjoining owner shall be borne by the other adjoining owners.

[*Sir F. Herschell, S.G.*, for the Local Government Board, intimated that he should not contend that any portion of the expenses of paving Bradford Lane, in front of Taylor's premises, could be recovered from the other adjoining owners; for the Local Government Board, might, in the exercise of its equitable jurisdiction, order the part of the cost from which Taylor should be relieved, to be charged upon the whole body of ratepayers within the district of the urban authority.]

That suggestion does not meet the difficulty, for when a street has been paved by an urban authority pursuant to the Public Health Act, 1875, s. 150, no part of the cost can be thrown upon the general body of ratepayers; the whole expense must be borne by the adjoining occupiers and owners: *Dryden* v. *Overseers of Putney* (1); *Attorney General* v. *Wandsworth District Board of Works.* (2) These cases were decided under the Metropolis Management Acts, but their principle applies to the Public Health Act, 1875. How, then, are the funds to be raised to liquidate that part of the apportioned expenses from which Taylor may be relieved by the Local Government Board?

Thirdly, the Queen's Bench Division has erroneously held that the grounds of complaint stated in Taylor's memorial may be altered at the hearing before the Local Government Board. Under the Public Health Act, 1875, s. 268, the memorial is to state the grounds of complaint, and a copy of it is to be delivered to the local authority. The grounds stated in the memorial may be frivolous, and therefore the local authority may not answer it or attend the hearing before the Local Government Board; nevertheless, if the contention against granting a prohibition be correct, the Local Government Board may proceed upon grounds other than those stated in the memorial, and may give judgment

(1) 1 Ex. D. 223. (2) 6 Ch. D. 539.

upon them without allowing the local authority an opportunity of disputing the validity of the new grounds of relief. This surely would be an unreasonable result.

Sir F. Herschell, S.G. (*Channell*, with him), for the Local Government Board. First, prohibition will not lie to the Local Government Board, for that department of State does not act judicially; the memorial does not complain of a judicial act committed by the urban authority, but merely of an administrative act; it is not an "appeal" in the strict sense of the word; it is merely an application for relief addressed to the discretion of the Local Government Board: if it exceeds its jurisdiction, its act is a nullity: Com. Dig. Prohibition (A. 1); *Ex parte Death* (1); *Reg.* v. *Local Government Board.* (2)

Secondly, if a prohibition will lie to the Local Government Board, it ought not to be granted provided any one ground of complaint is within the jurisdiction, for it ought to be assumed that the Local Government Board will act within its jurisdiction: *South Eastern Ry. Co.* v. *Railway Commissioners* (3); that case is a strong authority to shew that no prohibition ought to be granted. In order to obtain a prohibition it must be shewn that all the matters mentioned in the memorial are beyond the jurisdiction of the Local Government Board; and it is not disputed for the Local Government Board that a prohibition may be granted for matters beyond its jurisdiction, provided it is refused for matters within the jurisdiction. Until the demand for payment was made upon Taylor, there could be no appeal by him to the Local Government Board; for there had been no "decision" by the local authority within the meaning of the Public Health Act, 1875, s. 268. A notice to an adjoining owner to pave the street is not a "decision" of the urban authority, for nothing may follow from it; the urban authority may not think fit itself to do the work upon default by the adjoining owner. A demand for payment of the sum apportioned is a "decision," and must be made before the local authority can proceed summarily: *Grece* v. *Hunt.* (4) A "decision" means that which determines the liability of the adjoining owner.

(1) 18 Q. B. 647.
(2) 2 Ir. L. Rep. 316.
(3) 6 Q. B. D. 586.
(4) 2 Q. B. D. 389.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

A. L. Smith, for G. Taylor. No liability was created until the demand for payment was made; and that is the only "decision" at which the urban authority has arrived.

A. T. Lawrence, in reply. Upon the hearing of the memorial it is only possible to complain of the mode of payment which has been directed by the local authority.

BAGGALLAY, L.J. This is an appeal against an order of the Queen's Bench Division discharging a rule for a prohibition to the Local Government Board. The question arises out of the circumstance that the Local Board of Penarth served notices upon the owners and occupiers of certain premises requiring them to pave certain streets; and it is material to consider some of the sections contained in the Public Health Act, 1875. I shall refer particularly to ss. 150, 257, 268; but I may remark that the two last-named have probably a wider application than the first-named. By s. 150, where a street is not paved to the satisfaction of an urban authority, the authority may, by notice addressed to the respective owners or occupiers, require them to pave it: that is the first step. If the notice is not complied with, the urban authority may, if they think fit, execute the work: that is the second step. The urban authority may recover the expenses in a summary manner, or may by order declare them to be private improvement expenses, of which they may demand payment by instalments. In the present case notice to pave the streets was given to Taylor. As the notice was not complied with, the urban authority exercised their jurisdiction and did the work, and the appeal to the Local Government Board is about the expenses of that work. Sect. 257 contains provisions as to the duties and powers of the surveyor; his apportionment is binding and conclusive on the adjoining owner, unless he disputes it within three months, and in that case the dispute is to be referred to arbitration. The power to memorialise must be exercised within twenty-one days. After the works had been done a demand was made upon Taylor, and then for the first time he moved in the matter. A rule nisi for a prohibition was obtained, but it was discharged. Before us it has been argued that no prohibition will, under any circumstances, lie to the Local Government Board. As to this

point I say nothing. I see no ground for granting a prohibition, if it will lie. It has been contended for the appellants that there are three decisions of the local authority as to which an appeal could have been presented, if it had been presented in proper time by Mr. Taylor. The first was a decision to pave the street. The second decision is alleged to have taken place when Mr. Taylor received notice of the amount at which the surveyor had fixed the expenses, and when the urban authority had settled the amount of the proportion. The third decision is alleged to have taken place when the urban authority demanded that payment should be made in a summary manner instead of declaring the amount to be a private improvement expense. I cannot take that view as regards either of those first two alleged decisions. On a fair construction of the 268th section there is no decision until the time arrives when it is for the urban authority to decide, whether the amount shall be levied in a summary manner from a particular owner, or whether it shall be declared to be an improvement expense. But let me for a moment go back to the different occasions on which it is said a decision was arrived at. I am unable to see on what ground it is alleged that there was any decision arising out of the notice to Mr. Taylor, that the urban authority deemed it necessary that the streets should be paved. There was no decision; they merely called upon him to pave it, which he was not bound to do and which he would not do. When he refused and neglected to pave it, the urban authority were in no respect bound to do that which he refused to do. It was at their option if they thought fit to do it, and they did think fit and they did do it. I am unable to see that there was any decision then from which under the 268th section Mr. Taylor could have appealed. I pass on to the next stage of the proceedings, namely, when the works had been completed, the expenses ascertained, and when the surveyor had told Mr. Taylor what he, the surveyor, demanded as the proper proportion to be paid by him. It is to be observed that it is no decision at all of the urban authority. It is simply and solely a notice which the surveyor was no doubt authorised to give by the Act, but it was a notice given by the surveyor of the amount which he had ascertained to be the proper amount to be paid by the particular individual. I cannot follow

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Baggallay, L.J.

at all that there was any decision on the part of the urban authority, from which an appeal could have been brought within twenty-one days of the notice being given of it under the 268th section. However, before I pass on to there being a decision under the 268th section, and with reference to what that decision was, I will refer to the argument which was addressed, and very forcibly addressed, to us by Mr. Charles and Mr. Lawrence, namely, that, as regards an appeal from the determination to pave the streets, and as regards an appeal from the amount for which that paving had been done, the right time for appeal in both those cases having expired, there can be no appeal now to the Local Government Board. I confess I was for some time pressed by the argument, and it might, if not on the first occasion when the determination to flag the street was arrived at, yet when notice was given by the surveyor, be considered in the light of a decision of the urban authority; but for the reasons that I have already assigned I do not think it can be regarded as a decision. But the three months having expired from the notice given by the surveyor, that apportionment became absolutely binding as regards the proportion which the individual owner had to pay of the aggregate; and then it appears to me that the election, to use a term of perhaps somewhat doubtful meaning, on the part of the urban authority could be exercised whether they would order the expenses to be paid in a summary way, or whether they would declare them to be private improvement expenses. At any rate, whether election or not, it was a decision, and that decision was indicated to Mr. Taylor and, I presume, the other owners of the properties, by notice dated the 20th day of December, demanding payment within twenty-one days (following the provision of the Act of Parliament) of the amount at which the proportion of expenses had been ascertained. There was a decision of the urban authority upon the question, whether these should be made summary expenses, or whether they should be private improvement expenses. Upon the receipt of that notice Mr. Taylor had a right to appeal to the Local Government Board if he felt himself aggrieved by the course which had been taken, and I am unable, having regard to the general provision of that 268th section, to see, if he has a right, that the subject-matter of

appeal is in any respect limited. The whole matter is to be taken into consideration by the Local Government Board, and they are to make such order in the matter as they may deem equitable; and it appears to me that under that provision it would be open to the Local Government Board to entertain the question whether the aggregate amount of expenses were unreasonable or unnecessary, and also to entertain the question of the proportion of the amount assessed upon Mr. Taylor. I felt some little doubt at one time whether, prima facie, it would be right and proper that the Local Government Board should travel beyond the grounds of complaint which were alleged upon the memorial. I think they might very properly refuse to travel beyond those grounds when they had heard the circumstances. I do not think they were bound to travel beyond them, but in some cases they might think it right to do so, and in others to limit themselves to the memorial and to the complaint actually made. At the same time I think it was open to the Local Government Board to enter into all those various questions. However I gather from the turn the argument has taken that there is nothing which either party now desires to bring before the Local Government Board but the question of necessity for the works to be done, and the question whether the amount expended was excessive.

This being my view, I think the appeal should be dismissed.

BRETT, L.J. I agree with the Divisional Court that a writ of prohibition should not issue in this case, but I believe, as far as I can understand the judgment, that I do not agree with the grounds on which the judgment of the Court is based.

In this case, Mr. Taylor, the owner, had three notices served upon him. He had a notice on the 4th of May, 1881, from the Penarth Local Board, that they were dissatisfied with the state of the street, he being owner of land abutting upon that street, and that they required him to level, pave, metal, flag, kerb, and channel the same within twenty-one days. I am inclined to think that that notice expressed a decision of the Penarth Local Board which they must have arrived at, before they gave that notice, that they were dissatisfied with the state of the street.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

They must have decided that the street should be levelled, paved, metalled, flagged, kerbed, and channelled, and they decided to call upon him to do it. He therefore had notice, I think, of a decision of the local board and of a demand upon him by the board. On the 21st of September, 1881, Mr. Taylor received the second notice, and that notice seems to me to be a notice not of the Penarth Local Board but of the surveyor of the Penarth Local Board, a notice that the board had expended a certain sum upon the whole work, part of which Mr. Taylor had declined to do; that they had expended the sum of 375*l.* 0*s.* 11*d.*, and that the surveyor had apportioned the part of that sum which was to be paid by Mr. Taylor at the sum of 75*l.* 11*s.* 3*d.* He received notice therefore, on that occasion, as it seems to me, not of any decision of the local board at all. I cannot see what they had decided. They had expended as a matter of fact money, but the board had not decided upon the proportion which Mr. Taylor should pay. It had no authority to decide upon the proportion. That power is given by the Act, not to the board but to the surveyor, and the notice seems to be a notice of the surveyor that he has done his duty in apportioning it and he has apportioned the sum of 75*l.* 11*s.* 3*d.* On the 20th of December, 1881, Mr. Taylor received a third notice, and that notice no doubt is not by the collector, for the collector states in it that he is instructed—"I am directed to inform you that unless the amount be paid before the expiration of fourteen days from the date hereof, proceedings will be taken for the recovery of the same." It seems to me that the collector there has given a notice as servant of and on behalf of the local board, and that is a notice of the Penarth Local Board, and I think that is a notice of a decision. It is a notice that they have decided not to raise the sum by a private improvement rate or as private improvement expenses, but they have decided to recover that sum of 75*l.* 11*s.* 3*d.* if they can by summary process against Mr. Taylor, and therefore he then had notice of a decision. Now within twenty-one days from that and at a period of much more than twenty-one days after either of the other notices, Mr. Taylor sent a memorial to the Local Government Board, a memorial by way of complaint, and to my mind, the effect of his memorial is this: "I say it is inequi-

table that I should be called upon to pay in a summary manner 75*l.* 11*s.* 3*d.* on these grounds—upon the ground that some of the work which was done in this street was unnecessary, and upon the ground that the total sum expended in this street was unreasonable." I think that is the meaning. He did not in that memorial complain that the apportionment as between him and other owners was a wrong apportionment. Now, I think it will be taken with reference to the appellants here, that they had reason to suppose as against Mr. Taylor and against the Local Government Board, that upon this complaint and memorial of Mr. Taylor, the Local Government Board are prepared to consider his two complaints which he did set forth in the memorial, that they are prepared to consider the question whether some of the work was unnecessary and also the question whether the total sum expended upon the work which was done was unreasonable, and that they intend to consider both these matters in order to determine whether it was equitable to call on Mr. Taylor by summary process to pay the sum of 75*l.* 11*s.* 3*d.* Upon that state of facts, the appellants asked for a prohibition, and they asked for a prohibition, as I understand it, from the terms of the motion, against the Local Government Board proceeding any further in the matter at all. They did not confine their motion for a prohibition by admitting that the Local Government Board might inquire, whether the sum should be recovered by summary process or should be recovered as private improvement expenses. They did not leave that out, but they asked for a prohibition as to that also; and it is now said, as against them, that they ought to have confined their claim for a prohibition to the two first; that even if they had a right to claim a prohibition with regard to the question of whether the whole work was unnecessary, and even if they might have had a prohibition as to whether the sum was too heavy or not, it is urged against them that because they asked for a prohibition for more than as to the Local Government Board inquiring into something as to which they might properly inquire, therefore the appellants have asked for too large a prohibition, and therefore the rule nisi ought not to be made absolute; and, as I understand the decision of the judges in the Divisional Court, they refused to make the rule for the writ of prohibition

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

absolute, upon the ground that it had asked for too much, even if there were good grounds with regard to two of the complaints. Now, as the decision has been given on that ground, I cannot agree with it. It seems to me that where a party asks for a prohibition, and he asks the Court to prohibit another Court more than he ought to ask for, yet, nevertheless, if part of his request turns out to be well founded, the Court ought to mould the prohibition and to limit it to only so much of his request as is well-founded, and I think that the Solicitor-General did not contest that that was a fair view. Therefore, I cannot agree with this judgment on the grounds on which it was given.

But now we have had an elaborate argument on both sides. It is said on behalf of the appellants that there were three decisions within the meaning of the 268th section, there were three successive decisions by the Penarth board, and that against each of those as it arose Taylor had a right to appeal; but it is said that he did not appeal against two of them in time, and therefore the appeal to the Local Government Board could only be confined to the last, and that upon the appeal with regard to the last there was only one question which may be considered on the appeal, and that was the very question about which he had made no complaint, and therefore there was nothing upon which the Local Government Board could entertain an appeal or any question. It is asserted by the Solicitor-General first of all that even if there were three decisions against which Taylor would have a right to appeal, and that he is properly barred from two of them, and that it would be wrong for the Local Government Board to entertain the appeal upon two of the questions, and that it would be an excess of jurisdiction in them to entertain the appeal upon two of the questions, they are not a body against which a prohibition can lie; that is, if they exceed their jurisdiction, they are not a tribunal or set of persons against whom prohibition will lie at all. Now, in the view which I take of this case, it does not become necessary to determine whether that is a true contention or not, because with regard to that contention we do not think it our duty to give really any definite opinion. If this question had been fully argued, and we had come to a decision one way or the other, I should have been prepared to express the opinion of the

Court, but I think we need not give a decision upon a point so important to all parties. I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament. But with regard to this particular body I say no more with regard to that question. Upon the assumption that a prohibition might under certain circumstances go against the Local Government Board, the question is whether any such case is made out now, and that seems to me to raise the question of the construction of these sections of the Act of Parliament, and to raise the question really as to what decisions of the particular local board, there is an appeal, and what matters may be gone into upon the appeal which, I think, is given by this statute. Now that which is called an appeal is the appeal given in s. 268. That it is in some sense an appeal, although the word is not used, is obvious. I cannot come to the conclusion that the heading of a series of sections introduced into an Act of Parliament is not to be considered as part of the Act: I think that that word "appeal" at the head of the section may properly be considered as part and used for the purpose of construing any doubtful matter in the sections under that very heading. I take it therefore that there is an appeal given by the 268th section with regard to many things that are done and with regard to the matter which is before us. It certainly is not an appeal against a judicial decision; that is, the decisions of the Penarth Local Board are certainly not judicial decisions. Whether the decision of the Local Government Board is to be considered as judicial, I do not know that it is necessary to determine in the present case. I have a very strong opinion that it is, and that when this memorial is presented it is the duty of the Local Government Board to hear the parties who present that memorial. It is obvious that they are bound to hear the particular local board, if the person deeming himself aggrieved is bound to transmit to the local board the

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

memorial. Now whether they are bound to hear the parties orally, I do not undertake to say. That procedure is not marked out by this Act. I should doubt that they are bound to hear them orally, but that they are bound to let the party who presented the memorial know what is the answer of the particular sanitary board against which he has complained and to give him an opportunity of answering their answer to him, is, to my mind, obvious. What decision is it against which there is an appeal? We are driven, first, as it seems to me, to s. 268, "When any person deems himself aggrieved" it is not by any decision; it is not "by any decision of the local authority": but "In any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses," that is, the expenses already incurred by them "to be private improvement expenses," he may within twenty-one days after notice of such decision address a memorial to the Local Government Board. Now the "decision" is the decision described. It is a decision in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them. That seems to me, at all events, to shut out an appeal to the Local Government Board before expenses are incurred at all; therefore it shuts out the possibility of that first alleged appeal, namely, an appeal when the owner receives notice that he is called upon to do the work himself, because at that time no expenses have been incurred. Well, but it is also "in any case in which the local authority are empowered to recover in a summary manner expenses incurred by them." That seems to me to throw me back to consider in what case it is that a local authority is entitled to recover expenses in a summary way.

The other sections must be looked at. By s. 150 the local authority may give notice that the owner shall do certain works. After they have given that notice, they are not in a position to recover anything in a summary way. As has been pointed out, no burden may be placed upon anybody by that notice if the owner refuses to do the work. It may be that the local authority will not do the work, but if they do resolve to do it they are not in a position to recover anything. There is nothing to recover. Now the next provision is, that the local board may procure

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

the work to be done, and if the work is done they shall incur expenses. They are not then in a position to recover anything in a summary way. The next act is an act not to be done by them at all, but to be done by the surveyor. Now the surveyor is to apportion the sum, which has been expended as between different owners; in other words, he is to say, as it seems to me, when a sum has been expended, "I am to determine what is the fair proportion as between different owners that each of them is to pay—one is to pay one-fifth, another one-thirtieth, another one hundredth. That is the proportion and he is to determine that, and that only, and the local board cannot determine that, but the surveyor can. Well, when the surveyor does that, he is to give notice to all the persons with regard to whom he has made an apportionment. He gives notice to them, for what purpose? For the purpose that if they object to what he has done they are not to complain to him, they are not to complain to the Local Government Board, they are, if they are dissatisfied upon that question, to complain to the local authority. Well, but upon their complaint to the local authority what is to happen? No interference of the Local Government Board upon that now. They are to complain to the local authority, and thereupon the local authority is to appoint an arbitrator, and an arbitration is to be gone into. Well, if an adjoining owner does not do that within three months, what is the consequence? Why that the rate of apportionment is binding upon him, that is, if the surveyor has determined that he shall pay a fifth, a fifth he must pay, but that complaint has nothing to do with the amount which has been expended, has nothing to do with whether that amount was right or not; it has only to do with the apportionment of the special sum he has to pay, if that sum is right. It seems to me there is no ground for appeal under s. 268, for even if that is taken to be an order of the local authority, which it is not, they are not in a position to recover anything by summary process, or to declare that anything shall be treated as private improvement expenses. They are not in a position to do it. What must they do in order to put themselves in a position to do that? It is strange that what they are to do is not expressly enacted in this Act of

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

Parliament at all, it is only enacted by saying that the legislature has assumed that something else is to be done. These expenses by s. 150 it has been said may be recovered in a summary manner. Now we come to s. 257. "In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand." Now there is the enactment with regard to the necessity of the notice of demand, and the question is what is the necessary inference from that enactment? It seems to me that the necessary inference is that the notice of demand must be given by the local board, and that until they have given that notice of demand they are not in a position to recover anything by way of summary process: therefore the only notice which the local board has to give is a notice in a case where they are empowered to recover in a summary manner expenses. It seems to me, therefore, it is only upon that notice that the appeal to the Local Government Board is given, which appeal is mentioned as one, and one only in s. 268, that there is no appeal to the local board before that notice of demand. There is no appeal to the Local Government Board, when the local board determine that the streets shall be paved. There is no appeal to the Local Government Board, when the surveyor apportioned the amount which was to be due by Mr. Taylor. The only appeal is one appeal, there is but one, and that appeal arose upon the demand which is to be made by the board when the expenses have been incurred, and after the apportionment has been made, when they are bound to demand this sum which has been apportioned by the surveyor: then the appeal arises to the Local Government Board, because it is not until then that it can be said that it is a case in which the local authority are empowered to recover a sum of money. Now the appeal is to be made by memorial, and it must be made within twenty-one days after that notice. But in this case that memorial was presented within twenty-one days, and therefore the remaining question is, into what may the Local Government Board inquire on that appeal? It is assumed on the part of these appellants that the only question which the Local Government Board can inquire into, is

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

whether the local board equitably ought to have made the owner pay the sum which has been apportioned against him, or whether they ought to make the whole expenses private improvement expenses. Now what are the words which would oblige us to come to that narrow conclusion? It would be most narrow if after what I have said, there could be no appeal to the Local Government Board upon the question whether the works which are ordered to be done, ought as against an individual to have been ordered. There has been no possibility of appeal as to whether the local authority may have expended an unreasonable sum, and then obliged their surveyor to apportion as a consequence an unreasonable sum against the owner. There has been no appeal or possibility of appeal against either of those events, and yet it is to be said that the Local Government Board shall not exercise any control over those matters. Then the argument really comes to this, that there is no appeal at all in any shape or way as against the local authority to the Local Government Board upon those points. We must again look at the words to see how that is. He "may within twenty-one days of such decision address a memorial to the Local Government Board." Now, according to the argument, there is only one complaint which an adjoining owner can make. Why should he state it if there is only one ground of complaint? It would not want any statement for the memorial would be sufficient, but it is provided that, "he shall address a memorial stating the grounds of his complaint," not the one ground which alone it is argued he is entitled to make, but "stating the grounds of his complaint and shall deliver a copy thereof to the local authority." If an adjoining owner could only make the one complaint, what necessity would there be that he should deliver a copy thereof to the local authority? It seems to me clear that this section assumes that there may be several different grounds of complaint, which could not be anticipated by the local authority, because it is necessary to show those grounds of complaint in order that if they have an answer they may make it. I think the construction contended for is obviously narrow. It is absurd, it would be inconvenient, it would be unjust, it would be adding to the extreme power given to associations of persons by this Act of Parliament. It seems

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

to me obvious from the construction of the Act that the Local Government Board have power to inquire into every circumstance however remote, which could reasonably determine the question, whether it was inequitable or not that a particular sum should be paid. If that be so, they do not inquire into former matters as decisions of the local authority, but they inquire into them as facts in order to enable them to determine upon the largest interpretation of the word "equitable" that can be given to it, whether the particular sum is one which it is equitable, fair, and right that the individual should be forced by the legislature to pay for works which have been done against his will; and therefore I should be loth to the extremest degree to fetter the power of the Local Government Board to inquire into every fact, which could reasonably lead them to a fair and equitable conclusion with regard to that question which is the question before them. If that be so, it seems to me that the two causes of complaint which have been stated by Mr. Taylor here, are facts into which the Local Government Board might properly inquire in order to determine whether the sum of 75*l.* 11*s.* 3*d.* was an equitable sum or not, and therefore it is unnecessary to determine whether they might also inquire into another matter of which he has not specifically complained, namely, whether the decision was proper which had been made as to a sum to be recovered by summary process, or whether it should be made into private improvement expenses. I should have been very sorry to say because he has not mentioned that ground or any other ground of complaint in the memorial, that therefore the Local Government Board, if they think it right or equitable, should not inquire into it, because he had not complained of it. I think they ought to have the largest powers and the largest discretion to inquire into everything, to examine every fact which may lead them to a fair conclusion as between the local authority and the individual who has presented the memorial. Therefore, even if prohibition will lie in this case, there is no ground for saying that the Local Government Board, if they are about to enter into the question of whether some of this work was unnecessary, and if they are about to inquire into the question whether the total sum was unreasonable, and if they are about to inquire into the question whether

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Brett, L.J.

it was fair or equitable to declare the expenses to be private improvement expenses, or whether they should be recovered by summary process, would exceed their power and authority, if they did inquire into them. There is therefore nothing to prohibit, even if a prohibition lies. On these grounds I think the Court was right in the result in refusing to make the rule nisi absolute, but after having given my reasons it is obvious that I do not agree with the one ground upon which they based their decision.

Appeal dismissed.

Solicitors for Penarth Local Board: *Torr & Co.*

Solicitors for Local Government Board: *Sharpe, Parkers, Pritchard, & Sharpe.*

Solicitors for Taylor: *Ingledew & Ince.*

J. E. H.

[IN THE COURT OF APPEAL.]

Nov. 23.

SMITH & SON, APPELLANTS; THE ASSESSMENT COMMITTEE FOR THE PARISH OF LAMBETH, RESPONDENTS.

Poor Rate—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67)—*Rateable Hereditaments—Bookstalls on a Railway Platform—Exclusive Occupation—Exclusive Enjoyment—Licence or Demise.*

By indenture the South Western Railway Company granted to S. & S. (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, stationery, &c., and such other like articles required for the convenience of passengers by railway, as should be approved by the secretary of the company, at all their stations," &c.; and also full liberty for the "tenants," subject to the approval of the engineer of the company, to erect and place book-stands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls; and also full and free ingress and egress at all reasonable times for the "tenants," their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by S. & S. were to be under the control of the station-master, and liable to immediate removal from the station in case of insobriety or misconduct. S. & S. were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. & S. for the posting of the advertisements, &c., with a proviso that in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company in addition to any other remedies, "by distress, as in the case of rent in arrear." And it was provided that the "tenants" should not vend or offer for sale, or exhibit or publish, any

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company; and should abide by and observe the regulations from time to time made by the company touching the placing on the platforms any of the necessary bookstands; and the company warranted to the "tenants" "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid."

S. & S. erected bookstands upon the platforms at W. station, and had the exclusive use of them; and these bookstands were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstands, were exercised by S. & S., or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor rate for the station generally:—

Held, that S. & S. had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstands.

Judgment of the Queen's Bench Division (9 Q. B. D. 585) affirmed.

APPEAL of the Assessment Committee from an order of Field and Cave, JJ., on a special case holding that Smith & Son were not rateable.

The facts are fully stated in the report of the proceedings before the Queen's Bench Division (1), and they may be gathered also from the above head-note.

E. Clarke, Q.C., and *Archibald*, for the Assessment Committee. It may be admitted for the Assessment Committee that a person cannot be rated to the poor unless he is an occupier and unless that occupation is permanent and continuous: *Reg.* v. *St. Pancras Assessment Committee.* (2) But this condition precedent to liability to be rated has been fulfilled in the present case, for Smith & Son have had the occupation of the bookstands ever since 1872. The counsel for Smith & Son may rely upon *London & North Western Ry. Co.* v. *Buckmaster* (3); but in that case the agreement, under which the stable was held, was distinguishable in its terms from that under which the bookstands are demised.

[BRETT, L.J.:—That case is not an authority which is binding upon us, because in the Exchequer Chamber, which was a court of co-ordinate jurisdiction with ourselves, the judges were equally divided, and therefore the judgment of the Queen's Bench stood affirmed.]

(1) 9 Q. B. D. 585. (2) 2 Q. B. D. 581.
(3) Law Rep. 10 Q. B. 70; in Ex. Ch. 444.

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

In the Queen's Bench Division (1) some reliance appears to have been placed on *Reg.* v. *Morrish* (2); but the agreement in that case was merely a licence to sell refreshments. It has been held that an electric telegraph company is rateable in respect of its poles and wires placed alongside a railway, even although the railway company has power to order them to be removed to a more convenient situation: *Electric Telegraph Co.* v. *Overseers of Salford.* (3) A tramway company is rateable in respect of the tramway laid down in a highway, even although it has no power to abridge the free passage of the public: *Pimlico Tramway Co.* v. *Greenwich.* (4) Moorings to which a coal derrick is attached are rateable: *Cory* v. *Bristow.* (5) It is plain that Smith & Son are to a certain extent occupiers, and it is immaterial that that occupation began at the will of the railway company.

McIntyre, Q.C., and *Prosser*, for Smith & Son, were not called upon to argue.

BAGGALLAY, L.J. This is an appeal from a decision of the Queen's Bench Division, holding that Messrs. Smith & Son are not rateable in respect of the bookstalls situate at Waterloo Station, which were used by them under the provisions of the indenture dated the 25th of April, 1872. The question is not whether the bookstalls are in their nature rateable, but whether Smith & Son are rateable in respect of them. It appears from the statements in the special case that the railway company have been rated in respect of the profits derived from them, and the question in dispute really depends upon the nature of the possession, or occupation, of Smith & Son. At the commencement of his judgment Field, J., intimated that the question was whether the indenture of 1872 conferred an exclusive occupation or an exclusive enjoyment.

In adopting this view he was following the decisions in a great many cases, several of which he referred to. He proceeded to consider the effect of the deed, and, after pointing out that "from the beginning to the end of this document the parties carefully avoid all expression of intention to create a tenancy," he came

(1) 9 Q. B. D. at p. 596.
(2) 32 L. J. (M.C.) 245.
(3) 11 Ex. 181; 24 L. J. (M.C.) 146.
(4) Law Rep. 9 Q. B. 9.
(5) 2 App. Cas. 262.

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

"to the conclusion that the parties did not intend the indenture to operate as a demise, but only as a licence or privilege." (1) I agree with this conclusion. Although Smith & Son are called in the deed "tenants," that term is used only for the sake of convenience. There was no demise of any part of the station; there was only the grant for a term of "the sole and exclusive licence and privilege" to sell newspapers, books, and other articles required for the convenience of passengers by the railway. I agree that the railway company did not part with the possession of any part of their station, but merely conferred upon Smith & Son an exclusive right. It is clear to me that Smith & Son are not rateable, for the effect of the indenture was simply to grant a licence. The construction of Field, J., is my construction. I do not propose to go through the authorities, their result may be summed up in the following terms: where an exclusive occupation is conferred, the grantee becomes rateable; but, where merely a right to an exclusive enjoyment passes, the grantee takes no interest which renders him liable to be rated. This appeal must be dismissed.

BRETT, L.J. In this case the question is whether the indenture dated the 25th of April, 1872, amounts to a demise of part of Waterloo Station or is merely a licence to sell books and newspapers with leave to display and keep the same on different parts of the station. Parts of the indenture look like a demise, others are wholly inconsistent with an intention to create an interest of that kind. In order to ascertain the true meaning the whole instrument must be looked at; parts of it must not be taken separately, the question arises upon the whole. The grantees are called the "tenants;" but they can go into the station only at reasonable, that is particular, times and for limited purposes; the rent is to be paid for the whole of the licence or privilege granted; the bookstalls and cupboards have been erected with the approval of the company's engineer and are moveable at pleasure, for it is for the company to direct where they are to be placed. It is clear upon these facts that there has been no demise, the indenture creates only a license or privilege with certain auxiliary rights.

(1) 9 Q. B. D. at p. 594.

In this view Smith & Son have no rateable occupation; the only manner in which the bookstalls can be rated is that the railway company must be assessed at an enhanced value. It is not necessary to refer at length to the cases which have been cited. I need only say that I reserve until a proper occasion my opinion whether *London and North Western Ry. Co.* v. *Buckmaster* (1) was correctly decided.

LINDLEY, L.J. To me it is clear that the indenture dated the 25th of April, 1872, does not amount to a demise of any part of the station; it does not purport to be a demise, it is merely the grant of certain privileges. The indenture contains no reddendum, no clause for yielding and paying rent, such as is usually inserted in a lease: the grantees simply covenant to pay rent. The instrument has been so drawn as to avoid making it a lease. There is often a difficulty in ascertaining and defining what is an occupation capable of being rated. Even according to the argument which has been addressed to us, Smith & Son can be said to have an occupation only so long as the bookstalls and cupboards are erected; but in truth they have no right to occupy any spot, except with the approval of the company's engineer, and there was no intention that the company should grant to Smith & Son any particular part of the station. At most, only an easement was created. The cases which have been cited are distinguishable. In *Cory* v. *Bristow* (2) the House of Lords appear to have been of opinion that the owners of certain derricks had an actual, exclusive, and profitable occupation of the moorings to which they were attached. In the present case there was no exclusive occupation. The question before us is whether the judgment of the Queen's Bench Division is right: I am of opinion that it is right, and that Smith & Son are not liable to be rated. This appeal must be dismissed.

Judgment affirmed.

Solicitors for Smith & Son: *Harvey, Oliver, & Capron.*
Solicitor for assessment committee: *G. W. Barnard.*

(1) Law Rep. 10 Q. B. 70, 444. (2) 2 App. Cas. 262.

J. E. H.

1882
Nov. 14.

COOKE *v.* THE NEWCASTLE AND GATESHEAD WATER COMPANY.

Practice—Referee—Report to Judge—Application to set aside—Where made—Within what time made—Judicature Act, 1873, *ss.* 56-58.

11 QBD 180

Application to set aside the findings of a referee appointed under s. 57 of the Judicature Act, 1873, to try the issues of fact in an action and report to the judge making the order of reference, must be made to a Divisional Court and not to the judge, as such findings are by s. 58 equivalent to the verdict of a jury and can only be set aside by the Court.

Quære, whether the time for making the application runs from the time when the report is made to the judge.

MOTION to set aside the findings of a special referee, and to remit the case and report to him. The facts and arguments are fully stated in the judgment.

July 3. *D. Seymour, Q.C.*, and *Gainsford Bruce*, for the plaintiff.

Waddy, Q.C., and *J. Edge* (with them, *Sir F. Herschell, S.G.*), for the defendants.

Cur. adv. vult.

Nov. 14. HAWKINS, J. This action came on for trial before me and a special jury, at the Newcastle Summer Assizes, 1881. After some witnesses had been examined it became obvious that the facts would be much more satisfactorily ascertained and determined by a special referee; the parties therefore consented to my discharging the jury, and referring the issues of fact to a barrister-at-law upon the terms stated in the order of reference hereafter set forth. The jury were thereupon discharged, and an order of nisi prius was drawn up "by consent, that the issues in fact in this action shall be referred to" a barrister-at-law "as special referee, who shall inspect the premises in the pleadings mentioned, and who shall assess the damages, if necessary, in order to report to the judge. It is also ordered that the facts with reference to the liability of the parties shall be reported to the judge, and the questions of liability determined before the damages are assessed. It is further ordered that there shall be liberty to apply to the judge from time to time who shall have power to amend the pleadings whenever he may think fit." Under this order, the referee proceeded to inspect the premises, he heard all the evidence tendered on either side, and on the

12th of January, 1882, signed that which was intended to be his report to me. For reasons hereafter appearing I think it right to add that he has not to this hour delivered it to me, although as a matter of courtesy he has handed a copy to each of the parties, and they have furnished me with such copies.

On the 27th of February, 1882, the defendants' solicitor gave notice to the plaintiffs of an intended application to me to set aside the findings of the referee, and to remit the case and report back to him, upon the grounds that he had not fully or sufficiently reported the facts with reference to the liability, and had embodied in his report findings and conclusions of law which he had no jurisdiction to find or draw; and that his findings were against the weight of evidence. No steps were taken upon this notice, nor was any application made, either to a Divisional Court or to me, until the 3rd of July, when the case came on before me for further consideration. On that day all parties appeared, and the defendants' counsel then claimed to move in accordance with his notice. To this motion the plaintiff's counsel took two objections: 1st, that it ought to have been made to the Divisional Court and not to me, and that I had no jurisdiction to entertain it. 2nd, that at all events the motion was too late—and they claimed to have the findings of fact in the report treated as final.

I am of opinion that the first of these objections must prevail. My order referring the issues of fact was made under s. 57 of the Judicature Act, 1873. The effect of that order was to substitute the learned barrister for the jury, and to give to his findings of fact precisely the same effect as though those facts had been specially found by the jury in open court; this is in accordance with the express enactment contained in s. 58: see also per Cotton, L.J., in *Miller* v. *Pilling*. (1)

Now if the facts had been found by the jury I should have have been bound to determine the case and give my judgment upon the facts so found. However dissatisfied I might have been with the findings, I should have had no jurisdiction to set them aside—that could only have been done by a Divisional Court: see Order XXXIX., rule 1. The report of the referee stands in my opinion precisely upon the same footing. It is in truth

(1) 9 Q. B. D. 736.

1882

COOKE v. NEWCASTLE AND GATESHEAD WATER CO.

merely his written verdict upon the facts referred to him for trial, and is by no means to be looked upon as a report to be adopted or not according to the views of the judge before whom the case is in course of trial. That such was the intention of the legislature is clear from the language of s. 58 which makes the referee's report equivalent to a verdict unless set aside by "the Court." If it had been intended to confer upon the judge ordering the reference power to set aside a referee's report on questions of fact, I should have expected to find such jurisdiction conferred in express terms, the more especially since I find in the earlier part of the same section both the Court and the judge ordering the reference are invested with powers to regulate the course of the trial; in the Court alone, however, is vested the power to set aside the report when made. I am therefore of opinion that I have no jurisdiction to set aside the findings of the referee, but that such power is vested in the Divisional Court alone. (1)

In the argument before me Mr. Waddy for the defendant placed considerable reliance upon Order XXXVI., rule 34, as conferring upon me the power he desired me to exercise. In my opinion that rule has no such effect. It may well be that the "Court" upon application made to set aside the findings of a referee has, in order to enable it to adjudicate upon the application, power to require explanation, &c., from the referee; and to make such order for re-trial of all or part of the matters referred as justice may require: see *Miller* v. *Pilling* (2); but no such power is conferred by the rule in question upon the judge ordering the reference who is not even mentioned in that rule, though he is in some of the preceding rules of the same Order.

The last clause of the new rule 34 of Order XXXVI. was added to the old rule in consequence of the decision in the *Dunkirk Colliery Co.* v. *Lever*. (3) That case which was cited for the defendants does not affect the present case; that was a reference for "inquiry and report" under s. 56, and was before the Master of the Rolls sitting as "the Court." The addition confers no new power upon the judge ordering the reference; he has no right to disregard the findings of the referee and take upon himself to

(1) See *Guardians of Mansfield Union* v. *Wright*, 9 Q. B. D. at p. 686.
(2) 9 Q. B. D. 736. (3) 9 Ch. D. 20.

find the facts which by the order of reference he has directed shall be tried by the referee; to do so would be in direct contradiction of his own order more especially so where the order has been made by consent of the parties who have appointed their own tribunal to settle the facts. But it is totally different when the matter is before the Court on an appeal against the findings. The Court may then look at the evidence which was before the referee, and hear his explanations or reasons, and if it then appears to the Court that the findings are wrong or unsatisfactory, it may either remit the matter back for trial, or may, if it is satisfied that it has all the evidence and materials necessary for determining the question in dispute, decide those questions without remitting them back at all—a power analogous to that conferred by Order XL., rule 10.

As regards the objection that it is now too late to move to set aside the findings, I express no opinion. The Divisional Court must decide that. In the case of *Sullivan* v. *Rivington* (1), it was no doubt expressly held that when a referee has made a report, an application to remit the issues back to him for further consideration must be made within the time limited for moving against the verdict of a jury, but it by no means follows that the defendants are too late to move in the present case. In the case of a verdict, the time for moving against it ordinarily begins to run from the day on which the verdict is delivered. But in the case where the referee is to report his findings to the judge, it would at least seem reasonable that the time should not begin to run until the day on which the report is so made; for until then the referee cannot be said to have finally and irrevocably exercised his jurisdiction; up to that time he may reconsider the evidence as much and as often as he sees fit. It is only the report to the judge which is equivalent to a verdict, and it stands to reason that no motion can be made to set it aside until the report has been made.

I have already said that up to this hour the referee has made no report to me, and though he has in courtesy delivered to the parties copies of his intended report I have never been furnished with the original.

I have confined my judgment to so much of the motion as

(1) 28 W. R. 372.

1882

COOKE v. NEWCASTLE AND GATESHEAD WATER CO.

asks me to set aside the findings. Upon the rest of the motion at present I need say no more than this, that if on the argument I am satisfied the report does not embody all the material facts which the referee was required to find, of course I could upon an imperfect report pronounce no judgment in the action, and should probably require the referee to complete his report by finding all the issues submitted to him, but I should not require him to set out the evidence or his reasons for his findings—this I have no right to order him to do: see per Bramwell, L.J., in *Dunkirk Colliery Co.* v. *Lever* (1), and *Miller* v. *Pilling.* (2)

Should I be of opinion that the referee has exceeded his jurisdiction, either in his findings or in any other respect, I shall reject all such unwarranted findings and conclusions and treat them as though they had never been embodied in the report at all.

Such objections as that the report is imperfect, or that it is in excess of jurisdiction, may clearly be urged on the hearing on further consideration as grounds why judgment should not be given for the plaintiff who is applying for it: see *In re Brook, Sykes* v. *Brook.* (3)

For the reasons I have stated, I decline to entertain the application to set aside the findings, and propose to hear the case discussed on further consideration as soon as convenient to the parties after the referee has furnished his report to me.

Application refused. (4)

Solicitors for plaintiff: *Williamson, Hill, & Co., for J. A. Philipson, Newcastle-on-Tyne.*

Solicitors for defendants: *Pattison, Wigg, & Co., for Armstrong & Sons, Newcastle-on-Tyne.*

(1) 9 Ch. D. 20.

(2) 9 Q. B. D. 736.

(3) 50 L. J. (Ch.) 744. For rule laid down by Chitty, J., see *Burrard* v. *Calisher*, 19 Ch. D. 644.

(4) The defendants moved a Divisional Court to remit the case to the referee, this application was refused. They then appealed against this refusal and also against the decision of Hawkins, J., and these motions came on together for argument. The Court of Appeal confirmed the judgment of the Divisional Court and refused to remit the case to the referee, holding that there was evidence of negligence on the part of the defendants to support the findings, but they gave no judgment on the matters reported above.

A. M.

[IN THE COURT OF APPEAL.]

1882
Dec. 14.

DOBBS, APPELLANT; THE GRAND JUNCTION WATERWORKS COMPANY, RESPONDENTS.

Waterworks Company—Mode of calculating Water-rate—"Gross estimated Rental"—"Rateable Value"—"Annual Value."

By one of the special Acts of a waterworks company (7 Geo. 4, c. cxl. s. 27), it was provided that the water-rate was to be payable "according to the actual amount of the rent where the same can be ascertained, and where the same can not be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed." By a later special Act (15 & 16 Vict. c. clvii. s. 46), the waterworks company were compelled to supply water to occupiers of dwelling-houses for domestic purposes at the following rates, viz., "where the 'annual value' of the dwelling-house shall not exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 4*l.*, and where such 'annual value' shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*"

D. was the occupier and the lessee for a long term at a ground rent of a house supplied with water by the waterworks company:—

Held, reversing the decision of the Queen's Bench Division, that the water-rate must be computed on the "gross estimated rental" or "gross value" and not on the rateable value as appearing in the poor-rate assessment of the house supplied with water:—

Semble, that "annual value" as used in 15 & 16 Vict. c. clvii. s. 46, means the rack rent paid by the tenant to the landlord.

Reversed judgment below reversed by H.L.

CASE stated under 20 & 21 Vict. c. 43 by a metropolitan police magistrate.

The following are the material portions of the case:—

A dispute arose between A. E. Dobbs and the Grand Junction Waterworks Company, as to the amount which he should pay to the company for water supplied by them to him at his residence, and the same was referred to the magistrate under the Waterworks Clause Act, 1847 (10 Vict. c. 17), s. 68.

The summons alleged that complaint had been made that the company had made a claim for the sum of 4*l.* 10*s.* on A. E. Dobbs, being the amount alleged to be due to the company for two quarters' supply of water at No. 34 Westbourne Park to Michaelmas, 1881, which claim as to part thereof was based upon an annual value of 140*l.* of the premises; and that A. E. Dobbs disputed the amount of that annual value, and contended that

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

the annual value should be taken at 118*l.*, being the amount to which the said premises were assessed to the poor's rate.

Upon the hearing of the summons, the followings facts were either proved or admitted by both parties:—

A. E. Dobbs was the lessee for a term, of which about seventy years were unexpired, at a ground rent of 15*l.* a year of the house known as No. 34 Westbourne Park in the parish of Paddington, in the county of Middlesex, which he occupied as his residence. The lease, under which A. E. Dobbs held, contained covenants by the lessee to repair and insure as well as the usual covenants by a tenant. The portion of the claim or rate referred to in the summons, and as to which the dispute arose, was made upon A. E. Dobbs by the Grand Junction Waterworks Company in respect of the water supply to the house for domestic purposes, and the amount of this rate was arrived at by a calculation of 4*l.* per cent. upon a sum of 140*l.*, such sum being the gross annual value of the premises as appearing in the valuation list for the time being in force under the provisions of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

The magistrate held that the water-rate was chargeable upon the "gross value" as defined in the Valuation (Metropolis) Act, 1869, and therefore he dismissed the summons.

The question for the Court was whether the "gross value" so defined was the proper basis of the water-rate to be charged by the Grand Junction Waterworks Company to A. E. Dobbs or the "rateable value."

The Queen's Bench Division (Field and Bowen, JJ.) (1), held that the water-rate must be computed on the "rateable value" of the premises supplied with water as appearing from the poor-rate assessment, and not upon the "gross value." Leave to appeal was given.

The Grand Junction Waterworks Company appealed.

Dec. 9, 14. *Sir F. Herschell, S.G.*, and *J. F. Clerk* (*C. Russell, Q.C.*, with them), for the Grand Junction Waterworks Company. Even under 7 Geo. 4, c. cxl. s. 27 (2), the rateable

(1) 9 Q. B. D. 151.

(2) By 7 Geo. 4, c. cxl. s. 27 "the said Grand Junction Waterworks Co. shall be obliged, by means of any leaden or

value of a house occupied by its owner is not the test of its chargeability for the supply of water. A water-rate is not a rate strictly

other pipe or pipes, the bore thereof to be of the dimensions of three quarters of an inch (or larger if the said company shall require the same), to be provided and laid at the costs of the person or persons requiring the same, to furnish a sufficient supply of water at a height not exceeding six feet above the flag pavement to the house of every inhabitant occupying a private dwelling-house in any square, place, street, or lane where the pipes of the said company shall be laid, for the use of his or her own family, at the following rates per annum; (that is to say), where the rent of such dwelling-house shall not exceed twenty pounds per annum, at a rate per centum per annum not exceeding seven pounds and ten shillings; and where such rent shall be above twenty pounds and not exceeding forty pounds per annum, at a rate per centum per annum not exceeding seven pounds; and where such rent shall be above forty pounds and not exceeding sixty pounds per annum, at a rate per centum per annum not exceeding six pounds and ten shillings; and where such rent shall be above sixty pounds and not exceeding eighty pounds per annum, at a rate per centum per annum not exceeding six pounds; and where such rent shall be above eighty pounds and not exceeding one hundred pounds per annum, at a rate per centum per annum not exceeding five pounds and ten shillings; and where such rent shall be above one hundred pounds per annum, at a rate per centum per annum not exceeding five pounds; and every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated: Provided nevertheless, that the said company shall not be entitled to receive from any such inhabitant as aforesaid more than the sum of twenty pounds in any one year for such supply, nor shall such company be obliged to furnish such supply to any such inhabitant as aforesaid for less than twelve shillings in any one year, unless they shall think fit so to do: Provided, also, that in case of manufacturers, dyers, printers, bleachers, brewers, innkeepers, alehousekeepers, vintners, or other persons requiring a supply of water for other purposes than those of his or her own family consumption, or in case of persons requiring a supply of water for hotels, public chambers, clubs, or subscription houses, baths, fountains, ponds, pools, closets, water-closets (such closets or water-closets being supplied from any other cistern than a cistern for domestic purposes, situated within six feet of the flag pavement), or stables, or for washing carriages, or for cows or horses, or for the purposes of any trade or business whatsoever, such supply shall be furnished by the same company in such cases, at such rate as shall be settled by and between the directors and such persons respectively."

By the Grand Junction Waterworks Act, 1852 (15 & 16 Vict. c. clvii.), certain statutes including 7 Geo. 4, c. cxl. are recited, and by s. 46 "the company shall, at the request of the owner or occupier of any house in any street within the limits of this Act in which any pipe of this company shall be laid, or of any person who under

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

so-called: it is not laid upon every person who has a house: it is only the price which those have to pay who take the water, it is the price which every one who requires his house to be supplied with water, may by the statute be charged by the company for the supply of water. As A. E. Dobbs pays only a ground rent in respect of his house, it is not disputed that the rent "cannot be ascertained" within the meaning of 7 Geo. 4, c. cxl. s. 27, if that enactment is still in force; but it does not follow that the house is to be assessed to the water-rate at its net rateable value. This statute is inconsistent with the later Act, 15 & 16 Vict. c. clvii., s. 46: they deal with the same subject-matter, that is, the mode of paying the rate, and the supply for domestic purposes: therefore,

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the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for their domestic purposes at the rates hereinafter specified; (that is to say), where the annual value of the dwelling-house or other place supplied shall not exceed two hundred pounds at a rate per centum per annum on such value not exceeding four pounds; and where such annual value shall exceed two hundred pounds, at a rate per centum per annum on such value not exceeding three pounds. If there be a water-closet, or water-closets, or fixed bath or baths, or any high service in such dwelling-house or place, then, in addition to the rates above specified, the following rates shall be payable, (that is to say) . . . ."

The 46th section then contains a scale for the payment of rates for water-closets, fixed baths, and high service.

Sect 47, "The expression 'high service' in this Act shall mean and be considered as being a delivery of water at an elevation more than ten feet above the footway or pavement in front of the dwelling-house or other place supplied."

Sect. 48, "A supply of water for domestic purposes shall not include a supply of water for steam-engines, or railway purposes, or for warming or ventilating purposes, or for any machine or apparatus, or for baths, horses, cattle, or for washing carriages, or for gardens, fountains, or ornamental purposes, or for flushing sewers or drains, or for any trade or manufacture, or business requiring an extra supply of water."

Sect. 49, "The company may supply any person or body within their limits with water to be used within such limits for other than domestic purposes, at such rate and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply."

Sect. 57, "Except as by this Act expressly provided, this Act or anything therein contained shall not repeal alter, interpret, or in any manner affect any of the provisions of the recited Acts, or any of them, in force at the commencement of this Act."

the earlier enactment is repealed by the later, notwithstanding s. 57 of 15 & 16 Vict. c. clvii. In the earlier Act the rate of payment is ascertained by the rent; in the later Act it is to be fixed by the annual value. The scales being different, the two enactments cannot stand together. It is a vicious construction to apply the provisions for ascertaining the rent contained in an earlier Act to a later Act where annual value is the test of chargeability. If the provisions in 7 Geo. 4, c. cxl. s. 27, that the rate shall be payable according to the actual amount of rent when the same can be ascertained, is no longer in force, the alternative provision for fixing the water-rate when the rent cannot be ascertained, is inapplicable likewise. In all cases "annual value" is now the test: the legislature intended to lay down a uniform standard. It was an unsound principle to take the actual amount of rent as the basis of assessment, for houses of the same value might from different causes be let at various rents, and the occupiers, although they might require the same quantity of water, would nevertheless pay different rates. It was unreasonable that a man who had made a better bargain with his landlord and had got his house at a lower rent than his neighbour, should therefore pay less for the water which he bought from the company. There was, therefore, good reason why the legislature should intervene and do away altogether with rent as a test. At all events, in 7 Geo. 4, c. cxl. s. 27, the phrase, "according to the actual amount or annual value upon which the assessment to the poor's-rate is computed," refers not to the "net rateable value," but to the "gross estimated rental" or "gross value," for the "gross estimated rental" or "gross value" is a better and nearer equivalent than the "rateable value" for the "actual amount of rent," which, where it can be ascertained, is to be taken as the basis of assessment for the supply of water. The "gross estimated rental" or "gross value" is nearly the true annual value; and if the true annual value is always taken as the basis of assessment, whether the house is occupied by owner or a tenant, a uniformity of rating will be produced. For the purposes of rating to the poor the full annual value is first ascertained, and after the necessary deductions have been made, the rateable value is computed with reference to it; this was

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

substantially the course adopted even before the passing of the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), which by s. 1 requires this mode of procedure to be followed. The assessment to the poor's-rate is always computed with reference to the full annual value, although it is always less. "Annual value" in 15 & 16 Vict. c. clvii., s. 46, means what the house is worth to let by the year: it does not mean "rateable value:" to ascertain the "annual value" as used in this statute no deductions are to be made: in 7 Geo. 4, c. cxl. s. 27 the words "actual amount" are used as identical in meaning with "annual value."

Further at the time when 7 Geo. 4, c. cxl. was passed, the Parochial Assessment Act (6 & 7 Wm. 4, c. 96) was not in existence, and overseers of the poor might fix the estimated rental at what they pleased, and they might make whatever deductions from it they pleased, provided they assessed all hereditaments within the parish on equal terms: *Rex* v. *Adames.* (1) The rateable value might be reduced to any sum which the overseers pleased, provided they reduced it equally on the tenements throughout their parish, for any loss to the parishioners would be avoided by making the rate higher in amount; and, therefore, if the words in s. 27: "actual amount or annual value upon which the assessment to the poor's-rate is computed," mean the amount on which the house was to be rated, the overseers might without any disadvantage to the parishioners have reduced the water-rate almost to nothing for the benefit of the occupiers, where the houses were not let, but were inhabited by their owners. This is a result which cannot have been intended, for it would have inflicted great injury upon the Grand Junction Waterworks Company. "Annual value" means annual value to the tenant, that is, "gross estimated rental," it does not mean annual value to the landlord, that is, "rateable value." It may be reasonable to deduct for the purposes of the poor's-rate, the cost of repairs necessary to keep a house in a condition to command a proper rent, because a poor-rate is in its nature a charge upon the landlord; but a water-rate is a charge upon the occupier, the supply of water being for his benefit, and therefore the charge ought to be calculated upon the value of the house to the tenant: a water-

(1) 4 B. & Ad. 61.

rate is, in subtance, the price of goods sold and delivered to the occupier of the house. Wherever the assessment to the poor's-rate has been taken by the legislature as the basis for ascertaining the value of property, the assessment referred to means the gross annual value and not the rateable value; thus, in the Jurors' Act (6 Geo. 4, c. 50), s. 1, one of the qualifications for a juryman depends upon assessment to the poor's-rate or to the inhabited house duty; it was necessary to refer to the inhabited house duty, because that existed in extra parochial places (s. 7) where no poor's-rate was at that time made; but as the inhabited house duty was always levied upon the gross annual value, the legislature must have intended that the poor's-rate also should be assessed upon the gross annual value. Again, in 3 & 4 Vict. c. 61, s. 1, no license to sell beer was to be granted in respect of any dwelling-house, which should not be rated to the relief of the poor on a rent or annual value of certain amounts; but by s. 4 in extra parochial places where no rates were at that time made for the relief of the poor, licenses to sell beer might be granted in respect of dwelling-houses of the "real rent or annual value" of the specified amounts; in extra parochial places the qualification of a dwelling-house for the grant of a license depended upon its gross annual value; and it is plain that the same rule must have applied to dwelling-houses situate elsewhere. The statutes relating to the Grand Junction Waterworks Company are much stronger instances of the principle than the two statutes just cited.

[LORD COLERIDGE, C.J. As at present advised, all the members of the Court think that the contention for the Grand Junction Waterworks Company is substantially correct as to the questions which have been argued; it is therefore unnecessary at present to hear any argument on behalf of the company as to the meaning of "annual value" in 15 & 16 Vict. c. clvii. s. 46.]

H. Sutton and *Poley* (*R. E. Webster, Q.C.*, with them), for A. E. Dobbs. At the time when 7 Geo. 4, c. cxl., s. 27 was passed, the terms "gross estimated rental" used in the Parochial Assessment Act (6 & 7 Wm. 4, c. 96) and "gross value" used in the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67) were unknown to the law: "annual value" meant "rateable value," and the

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

phrase was used with this well-recognised meaning in 7 Geo. 4, c. cxl. s. 27. The "rateable value" or "annual value" was always less than the rack-rent of a house, because some part of the rack-rent must be set apart for repairs or rebuilding in order to maintain the house in a state fit for occupation: *Rex* v. *Tomlinson*. (1) This case is quite in accordance with *Rex* v. *Lord Granville* (2) and *Rex* v. *Adames*. (3) The phrase "annual value" as used before the passing of the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), was identical in meaning with the words "net annual value" used in s. 1 of that statute. At that time the overseers had only to find out what the rateable value was, and they might rate the inhabitants of the parish only on a proportion of that rateable value. Where a house was occupied by its owner, there might be great difficulty in finding out what rent it would fetch if it were let to a tenant; and, therefore, the legislature intended by 7 Geo. 4, c. cxl. s. 27, that the poor-rate book should be the guide in determining the amount of the water-rate. This was not at that time considered a hardship upon the waterworks company, because "rateable value" was then deemed to be the "annual value." It must be admitted on behalf of A. E. Dobbs that a house ought to be rated at the same amount for the supply of water, whether it is occupied by an owner or a tenant, but the supposed difficulty as to the inequality of assessment arises merely from misconstruing the word "rent" as used in 7 Geo. 4, c. cxl. s. 27. It is plain that "rent" does not mean the sum actually paid by the tenant to the landlord; for it cannot include a "ground-rent," nor a case where out of motives of friendship a house is let below its real worth, nor a case where a premium has been paid for a lease, nor a case where the tenant takes the house at a less yearly sum on condition of paying the landlord's rates, taxes, and insurance. The word "rent" in s. 27 means the worth to the landlord after deducting from the sum paid by the tenant the amount of repairs, expenses, and insurance: it is, in fact, the "rateable value" from which the occupier is to be assessed, whether he is owner or tenant. This construction

(1) 9 B. & C. 163, at p. 166. (2) 9 B. & C. 188.
(3) 4 B. & Ad. 61.

gets rid of all difficulty as to inequality of assessment. Except in the case of statutes relating to the public revenue, the "annual value" of property as used in Acts of Parliament refers to the "rateable value." Property is not of the clear yearly value of 40*s.* if it requires any expenditure to obtain that amount: *Hamilton* v. *Bass.* (1) There is no clause in 7 Geo. 4, c. clx. which renders it necessary to estimate the "annual value" with reference to the occupier. The "annual value" to the landlord is the balance which remains after paying for the repairs, the insurance, and the other expenses; it means only part of the rent.

If, however, this Court is of opinion that "annual value," as used in 7 Geo. 4, c. cxl. s. 27, is equivalent to "gross value" or "gross estimated rental," it is contended that the section is repealed, and that "annual value" in 15 & 16 Vict. c. clvii. s. 46, means "rateable value." At all events, the limit of 12*s.* as the minimum sum for which the company are to supply water can hardly now be in existence, for by 15 & 16 Vict. c. clvii. s. 46, every householder within the district of the Grand Junction Waterworks Company is entitled to demand a supply. The legislature no doubt intended that where a house is occupied by its owner, and a dispute arises as to its yearly worth, the parties might be able to appeal to a fixed and ascertainable standard; and that standard would best be found in the rateable value as stated in the poor-rate book.

Sir F. Herschell, S.G., did not reply.

LORD COLERIDGE, C.J. In this case a question, which is, I have no doubt, important as regards the amount of money involved, is raised before us as to the true construction of the two Acts of Parliament referring to the Grand Junction Waterworks Company, 7 Geo. 4, c. cxl. and 15 & 16 Vict. c. clvii., and the question is upon what footing the water-rate, so to call it (though in strictness that is not a correct expression), which the Grand Junction Waterworks Company have a right to take in return for water furnished by them to houses within the ambit of their Acts, is to be calculated.

(1) 12 C. B. 631.

1882

DOBBS v GRAND JUNCTION WATERWORKS COMPANY.

Lord Coleridge, C.J.

On the one side it has been said that the footing upon which it is to be calculated is not the gross annual value of each house—I abstain for the moment from saying what "annual value" means for this purpose—but the gross annual value subject to those deductions which are familiar to us all, and which are made before the actual sum is ascertained which is assessed upon those who are liable to pay the poor-rate. On the other side it is said that the words of the Act of Parliament are express, and that the earlier Act, 7 Geo. 4, c. cxl., according to its true construction, is manifestly intended to mean the gross annual value of the houses and the tenements in respect of which the money is to be paid without those deductions. But another question must be decided; it is perhaps prior to that which I have already mentioned, that is, whether the two Acts of Parliament, 7 Geo. 4, c. cxl. and 15 & 16 Vict. c. clvii., are both existing, or rather, to put it more correctly, whether s. 27 of the earlier Act and s. 46 of the later Act are co-existing.

It has been argued strongly on behalf of the Waterworks Company that they are not co-existing, but that if they are co-existing, the larger view of the sum upon which the rate is to be assessed, is to prevail. Now I am of opinion that both these sections exist, and that the section in the later statute has not repealed the section in the earlier statute. The later statute, by the 57th section, expressly preserves all that is not expressly repealed. Its words are: "Except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions of the recited Acts, or any of them, in force at the commencement of this Act." The statute, 7 Geo. 4, c. cxl., was one of the recited Acts, and was in force at the commencement of 15 & 16 Vict. c. clvii., and therefore the 27th section not being expressly repealed by the later Act remains in force. I quite agree that if the enactments in the later statute, although not in terms repealing those in the earlier, nevertheless were absolutely inconsistent with them, the later provisions would, according to well known principles of interpretation, be held to repeal the earlier by necessary intendment; but I do not think that the 46th section of the later statute is an enactment of that kind with regard to the 27th

section of the earlier. It has been contended during the argument on behalf of the Grand Junction Waterworks Company, that both the limit of 20*l.* as the maximum which the company are to receive in any one year, and the limit of 12*s.* payable in any one year as the minimum sum in respect of which they are bound to supply water, are untouched by the later statute and remain in force. I will not stop to inquire whether the limit of 12*s.* is unaffected, and it has been contended on behalf of Mr. Dobbs that it is not now in force, owing to s. 46 of the later Act. But, however, this may be, it seems to me clear that the 27th section is not entirely repealed. It appears to me that it may well stand with the 46th section, which may be construed as having only this limited operation, namely, that whereas the earlier Act had provided with considerable care certain rates per centum, certain physical levels, and certain terms of supply, the rates per centum, the physical levels, and the terms of supply are distinctly and expressly altered by the provisions of the later Act. Of course, so far as these provisions are altered, the two Acts cannot stand together, and the later Act has superseded the former; but it seems to me that, except so far as it has been superseded, the earlier Act remains, and the earlier Act not only fixes certain rates per centum, but also fixes the mode in which those rates per centum are to be ascertained. The provision in the earlier Act is as follows: after certain specific enactments as to rent up to 100*l.* a year, it provides that "Every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." I construe the section to mean this, that the rate is to be fixed by the amount of rent. Rent may be used there in the ordinary meaning of the word, as the rent paid to the landlord by the tenant for the occupation of the dwelling-house, which is, ordinarily, a rack rent, and the primary intention of this section points to the rack-rent to be paid by the tenant to the landlord. Where the amount of that rent can be ascertained, then the rate is to be payable according to it. I am of opinion that cases of ground-rent and cases of

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

Lord Coleridge, C.J.

private arrangement, whereby the rent does not become a rack-rent, do not come within the meaning of the words, "the amount of rent where the same can be ascertained," unless the rack-rent in addition to the ground-rent, or unless the premium, besides the rent, can be ascertained, and unless some person competent to make the computation can allot to each year, what is the fair proportion of the rent, if it be ground-rent, or of the premium which was paid, if it be premium; but whatever arrangement may have been made between the landlord on the one hand and the tenant on the other, it is necessary to define what is the true amount which year by year the tenant is paying to the landlord for his occupation. Where that can be ascertained, then the rate is to be paid according to the actual amount; where it cannot be ascertained, and in many cases it cannot, then it is to be "according to the actual amount or annual value upon which the assessment to the poor's-rate is computed." It seems to me that these words taken with the rest of the section, are reasonably clear, and that they mean the full amount at which the house to be rated would have been at the time of the 7th Geo. 4, valued by the persons who were to rate it, that amount not being subject to be afterwards reduced by those various heads of allowance with which we are all familiar, and which were to be made by the overseers before the actual assessment upon any individual was arrived at; because the actual amount upon which the assessment is computed, seems to me to be totally different from the actual amount of the assessment. It would have been easy to say that the rate should be paid upon the assessment in the poor's-rate book, and it would have been easy to say that it should be assessed upon the rent where the rent can be ascertained, and upon the poor's-rate where the rent cannot be ascertained. But the words in the section are different. We know historically that at the time of passing the 7th Geo. 4, c. cxl., the value of the house was ascertained, and the occupier was rated in respect, not of the full value, but of that full value subject to certain deductions which were always made even before the Parochial Assessment Act of William IV.

It is to be observed, and of course every one acquainted with the matter knows it perfectly well, that the poor's-rate is not in

strictness a rate upon houses, or upon lands, or upon property. For general purposes indeed it is rightly enough described as a charge upon property, but according to the statute 43 Eliz. c. 2, which never has been altered, it is a charge upon persons; and it is a charge to be paid by inhabitants of a parish according to their ability; and the way of getting at their ability is, to see what they occupy, and what is the value of their occupation. In that way the poor's-rate has come to be, for all ordinary purposes, roughly described as an assessment on property, but it is a personal charge made upon individuals in respect of property, and not a charge on the property itself that the inhabitants have. That seems to me to shew that the words "assessment to the poor's-rate is computed" must have a well understood meaning; that they mean the value of the occupation after it has been first of all roughly taken, and then the value of it to a particular individual computed according to well-known principles, the result being that upon which the assessment to the poor's-rate is actually computed. It is not the assessment to be levied, but the assessment to be computed. I think, therefore, that according to the true construction of 7 Geo. 4, c. cxl. s. 27, which, for the reasons that I have given, appears to me to be still operative, the rate, which the Grand Junction Waterworks Company are entitled to levy, is to be upon the actual amount of the rent, that is, the full amount which the tenant pays, where it can be ascertained, but, where it cannot be ascertained, then upon the whole and full amount of the value of the property in the hands of the owner before any deductions are made therefrom. That appears to me to be the true view of these two sections: that is to say, that the sections stand together, and that the earlier section is still in operation. It will follow that we are unable to come to the same conclusion at which the Court below has arrived, and we think that the assessment was properly made on the sum of 140*l.* a year, and not on the sum of 118*l.*

We have not heard an argument at length as to what is the real meaning of the words "annual value" in the later Act. If we had come to an opposite conclusion, and had thought that the earlier section was repealed, we might have been driven to consider the meaning of the words "annual value" in the second

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

Lord Coleridge, C.J.

statute. We have not heard that argument in full, and therefore any opinion which I may pronounce must be considered to be pronounced subject to the disadvantage of not having had the question fully argued before me. But I think I may go so far as to say this, that the strong inclination of my opinion is, that "annual value" in the later Act means the same as "annual value or actual amount" in the first Act. I think so for various reasons: first of all, there is analogy to support the argument; and secondly, as the 27th section of the earlier statute exists, and as the same words are used in two Acts of Parliament in pari materia, they ought to be construed alike in both; for the reasons which have convinced me that "annual value" has a particular meaning in the earlier Act, I hold that it has the same meaning in the second Act. Therefore, although I have not heard the point fully argued, the strong inclination of my opinion is, that it really does not signify for the decision of this case, whether we consider the first Act of Parliament or not, because I should come to the same conclusion upon the words "annual value" in the second Act, as I have come to on the first. I therefore think that the judgment of the Court below cannot be supported, and that this appeal must be allowed.

BAGGALLAY, L.J. I am of the same opinion, and I have very little to add. The 27th section of 7 Geo. 4, c. cxl. and the 46th section of the Act 15 & 16 Vict. c. clvii. severally contain provisions as to the rate at which water is to be supplied; but there is a difference between the two sections in dealing with the purposes for which the water is to be supplied. If we turn to 7 Geo. 4, c. cxl. s. 27, the first provision has reference to water supplied, for, what I may call generally, domestic purposes, to the occupier and his family. Then a limitation is put as regards the highest amount which may be demanded in respect of the water-rate, and a limit is put also for protecting the company from being compelled to provide water for any sum less than 12*s.* per annum. Sect. 27 goes on to provide for the supply of water for various other purposes; for instance, for the supply of water to manufacturers, for water-closets, for baths, and, amongst other things, for washing carriages, and for horses or cattle. These are addi-

tional matters which are provided for by 7 Geo. 4, c. cxl., and as to which the company, and the persons who desire the water supply, have to make arrangements for themselves. When we turn to 15 & 16 Vict. c. clvii. s. 46, we find that it is limited to water for domestic purposes; it does not apply to those other additional matters: it substitutes a percentage of rate upon the annual value for the percentage of rate upon the rent, which is mentioned in the former Act. It also makes special provision as regards water-closets and baths, and also makes a variation as regards the high service; those we may all consider as domestic purposes. But the 48th section expressly provides that a supply for domestic purposes shall not include a supply of water for the various purposes which are there mentioned, and which were included in s. 27 of 7 Geo. 4, c. cxl.; therefore, it is quite clear that to some extent, at least, the 27th section of the Act of George IV. must remain in full and complete force. The 57th section of 15 & 16 Vict. c. clvii. expressly provides that nothing contained in that Act shall repeal, alter, interpret, or in any manner affect any of the provisions of the recited Acts (of which 7 Geo. 4, c. cxl. was one), or any of them in force at the commencement of the Act. The question is to what extent is this s. 27 repealed? It seems to me, upon reading the two sections together, that it is abundantly clear that, so far as a percentage is made upon rent, so far also as special arrangements are to be made for water-closets and baths, so far as arrangements are to be made for high level service, and so far as there may be a difference between the two Acts, the former Act is repealed by the later Act; but, except so far as the former Act is repealed by reason of express provisions being directed to the very subject-matter as the former Act, it appears to me that the Act of George IV. must remain in force.

That drives us to consider what is the true interpretation to be given to the words, which have been so much the subject of discussion on the present occasion. As I have said before, the test in 7 Geo. 4, c. cxl., is rent, and the Act goes on to provide in what way the amount of rent is to be ascertained. "Every such rate shall be payable according to the amount of the rent, where the same can be ascertained, and where the same cannot be

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

Baggallay, L.J.

ascertained" (that is to say, where no rent is paid) "according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." The mode in which the assessment to the poor's-rate was computed, at the time when this Act was passed, was well known. *Rex* v. *Adames* (1), to which our attention has been drawn, following other cases prior to the passing of the Parochial Assessment Act, shewed how the assessment to the poor's-rate was computed. The actual rack-rent, subject to certain deductions, was the basis upon which the assessment for the purposes of the poor's-rate was computed. In the same way, if no actual rack-rent could be ascertained, an estimated annual value was put upon the hereditament by the overseers, probably not accurately; but still it was assumed that that was the value or rent, and from that in a like manner similar deductions were made as in the case where the rent could be ascertained. That was the process by which the assessment to the poor's-rate was computed at the time when the 7 Geo. 4, c. cxl. was passed, and it remained in force up to such time as the Parochial Assessment Act was passed. It seems to me that the words of 7 Geo. 4, c. cxl. s. 27, are exactly met by the circumstances which then existed; the "annual value" is not the annual value at which the house is assessed to the poor's-rate, but the annual value upon which the assessment to the poor's-rate is computed. When that assessment has been made, when the assessment has been computed from the full annual value, and that value has been arrived at, which is the subject of rating, that value is very well known by the expression "net annual value," as distinguished from the "gross annual value" or "gross estimated value" which represented the gross amount of value. It appears to me that, if I am right in my view, which I entertain very strongly, 7 Geo. 4, c. cxl. s. 27, is not repealed by s. 46 of 15 & 16 Vict. c. clvii. The assessment intended by the legislature clearly is that, which my Lord has referred to, and not that which was adopted in the Court from which this appeal has been brought.

As regards the other questions, it appears to me that if we were to treat this portion of 7 Geo. 4, c. clx., s. 27, as repealed, never-

(1) 4 B. & Ad. 61.

theless in the later Act the words "annual value" are used, and when one Act is recited in another, and when the later provisions may be considered as supplemental or taking the position of those in the former Act, it appears to me impossible to give a different meaning to them in the Act of Victoria from that which was given to them in the Act of George IV.

For these reasons I think the appeal must be allowed.

LINDLEY, L.J. I also think this appeal ought to be allowed. The question which we have to solve, broadly stated, is how we are to ascertain the price which a consumer of water is to pay for it. The Acts of Parliament do not say that he is to pay by measure or meter; but they have adopted a different scheme, namely, that he is to pay according to the class of house which he occupies; and the class of the house which he does in fact occupy is to be ascertained in a method which is specified by the Acts of Parliament. In 7 Geo. 4, c. cxl. s. 27, the rent which the consumer pays is made the test or standard of the class of house; and by "the rent which the consumer pays," I do not mean the ground-rent, but the rent which he pays for the dwelling-house. The phrase, "the rent which the consumer pays," I apprehend, will include the premium or bonus for entry; that is how I construe the word "rent." Then it is necessary to ascertain what is to be done where no rent is payable, and 7 Geo. 4, c. cxl. s. 27, tells us what is to be done in that case. It is important in reading this Act to observe what it exactly says; it directs how the equivalent of rent is to be ascertained; it uses this language, that in every such house the sum (that is, the sum payable for the water), shall be payable "according to the actual amount of the rent, where the same can be ascertained, and where it cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." Upon this language what strikes me at first sight is that nothing is said about "net annual value;" it is "the actual amount or annual value," the word "net" being left out. Neither does the Act mention the "rateable value." If it had meant that the value should be used for the purposes of assessment, I suppose it would have said so; but at

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

Lindley, L.J.

all events, it does not say so. It does not say the value "upon which the assessment is made," but the language is "actual amount or annual value upon which the assessment to the poor's rate is computed." In order to understand that, we must bear in mind the state of the law at the time when this Act of Parliament was passed. Both sides agree upon what the state of the law was, each invoking it on his own behalf; but I confess that having studied with care *Rex* v. *Adames* (1), which shews the principle upon which property was then rated to the poor's-rate, it strikes me as almost a reductio ad absurdum to say that the price of water was to vary with, or to depend upon, the rateable value. When it is understood that, according to the old law, rateable value was a mere proportion, or might be a mere proportion, and that it was immaterial for the purpose of making out what that proportion was to state the true value, it does strike me as almost ridiculous to suppose that the Act of Parliament could have placed in the hands of the overseers the power of fixing the price of water supplied to the occupiers of the houses. I confess that that appears to me to be a most formidable difficulty, and a difficulty which cannot be got over, except by words which are perfectly unmistakable. I feel the force of Mr. Sutton's observations, and also of the observation which was made in the Court below, that apparently the object of the legislature was to enable the parties to appeal to some kind of standard which was ascertainable, and rateable value has the advantage that it is an ascertainable standard; but unless an ascertainable standard is fixed and determined according to some definite principle, I think it would be unjust and ridiculous to adopt it as a basis of assessment. The language of 7 Geo. 4, c. cxl. s. 27, does not require us to adopt the construction contended for on behalf of Mr. Dobbs; it admits of a different view altogether. It appears to me that the alternative construction is preferable, and that makes the whole section intelligible, though I admit a practical difficulty in finding out the basis of assessment. The result is that the rent must be taken as the basis of assessment when it can be found out, and when it cannot, it must be ascertained what the houses would let for. That appears to me to be the real meaning of those words.

(1) 4 B. & Ad. 61.

I pass on to the later Act of Parliament; whether it repeals the 27th section of the earlier Act or not, is not very clear. I do not think that it does; but the real truth is, that the greater portion of the 27th section has become obsolete, if not repealed, owing to this second Act of Parliament. Without scanning that Act of Parliament very closely it would be difficult, and perhaps impossible, to say exactly how much of this section is obsolete and how much is not; it is obvious enough that a great deal of it is obsolete; but it has struck me, as it has struck the Court below, and as it has struck my Lord and my Brother Baggallay, that it is not wholly repealed. It appears to me, therefore, having regard to the 27th section in 7 Geo. 4, c. cxl. that we have a clue to the meaning of "annual value," and that the words "annual value" in 15 & 16 Vict. c. clvii. must be construed with reference to the same meaning as in 7 Geo. 4, c. cxl., and in either case I think the real meaning is, whether the house is let or not let, what it would let for. If it should be held that 7 Geo. 4, c. cxl. is wholly repealed by 15 & 16 Vict. c. clvii. then we come to the question, what "annual value" in this latter statute means. We have not heard that point discussed, therefore I say no more about it, except that so far as I can make out, the words "annual value" in the later Act have the same meaning as in the earlier Act, and therefore I think the construction contended for by the Grand Junction Waterworks Company is made out. It appears to me for these reasons that the judgment of the Court below is wrong and must be reversed.

Judgment reversed.

Solicitors for Dobbs: *Hollingsworth, Tyerman, & Andrewes.*

Solicitors for Grand Junction Waterworks Company: *Bircham & Co.*

J. E. H.

1883
Feb. 14.

SHAFFERS *v.* THE GENERAL STEAM NAVIGATION COMPANY.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (*sub-s.* 2), *s.* 8—*Negligence—Common Employment—*"*Person having superintendence entrusted to him.*"

11 QBD 624

The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold:—

Held, that J. was "engaged in manual labour," and was not "a person having superintendence entrusted to him," within the meaning of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 2, as defined by s. 8.

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), to recover damages for personal injuries sustained by the plaintiff while in the defendants' employ. The cause was tried before the judge of the City of London Court, when the following facts were proved.

The plaintiff was employed with other men on board a ship called the *Ida*, belonging to the defendants, in loading corn from a barge moored alongside, and at the time of the accident the plaintiff was in the hold of the ship stowing away the sacks of corn as they were lowered down the hatchway. A steam crane was fixed on the deck of the *Ida*, by means of which the sacks were hoisted out of the barge, and when they had been lifted sufficiently high the beam of the crane was swung round over the hatchway, and the sacks were lowered into the hold of the ship. In order to control the movements of the beam there was a guy-rope fastened to it, the charge of which was intrusted to a man named Jones; it was his duty to stand by the hatchway and warn the men below to stand from under, to guide the beam of the crane by means of the guy-rope, and to tell the man who was actually working the crane when to lower and when to hoist. On the day in question, owing to the ship having a slight list to starboard, the beam of the crane swung round, but Jones neglected to check its movements by means of the guy-rope, in consequence of which the sacks struck the combing of the hatchway, were

1883

SHAFFERS v. GENERAL STEAM NAVIGATION COMPANY.

thrown out of the sling, and fell down the hatchway upon the plaintiff and broke his leg. It was contended on behalf of the plaintiff that the injury was caused "by reason of the negligence of a person in the service of the defendants who had superintendence intrusted to him, whilst in the exercise of such superintendence," within the meaning of s. 1, sub-s. 2 of the Act; while the defendants contended that Jones was merely a fellow workman, who had no authority over the gang, and that he was not a "person who has superintendence intrusted to him," which expression by s. 8 of the Act, is defined as meaning "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." The judge adopted the latter view, and nonsuited the plaintiff, but stated a case for the opinion of the Court.

Bankes, for the plaintiff. The judge found as a fact that Jones might have avoided the accident; and that it was caused by his negligence. He was in charge of the crane, and was practically superintending the operations, for he gave directions to the man actually working the crane when to lower and when to hoist. He was in the position of a person contemplated by s. 1, sub-s. 2, as defined by s. 8 of the Act.

Rugg, for the defendants, was not called upon.

MANISTY, J. I am of opinion that the nonsuit was right. The only question is whether Jones was a person "having superintendence intrusted to him." Superintendence is defined in the 8th section of the Act, and it is contended that Jones was at the time of the accident in a position of superintendence within the meaning of that section. It is found in the case that he gave directions when to lower and to hoist the crane, and that it was also his duty to guide the beam by means of the guy-rope. Assuming that he superintended the working of the crane, was he exercising such a superintendence as is contemplated by the Act? I am clearly of opinion that he was not a person whose sole or principal duty was that of superintendence, and that the accident was not caused by his negligence "while in the exercise of such superintendence."

1883

SHAFFERS v. GENERAL STEAM NAVIGATION COMPANY.

MATHEW, J. I am of the same opinion. I think that Jones was "engaged in manual labour," and not a superintendent within the meaning of the Act. The accident arose from his negligence in the capacity of a workman, and not of a superintendent.

Judgment for the defendants.

Solicitors for plaintiff: *Ellis & Crossfield.*
Solicitors for defendants: *Watson, Sons, & Room.*

J. R.

March 20.

DOUGHTY *v.* FIRBANK.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—"*Railway*," *Meaning of.*

The meaning of the term "railway" as used in the 5th sub-section of the 1st section of the Employers' Liability Act, 1880, is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies also to a temporary railway laid down by a contractor for the purposes of the construction of works.

THIS was an action in the county court of Croydon under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). At the trial the facts appeared to be as follows:—

The plaintiff was employed by the defendant, a contractor, and sued to recover damages for personal injuries sustained through the negligence of a fellow-servant.

It appeared that the defendant had contracted for and was engaged in the construction of a line of railway for a railway company, and a temporary railway had been laid down for the passage of waggons and trucks used for the purposes of the works. The plaintiff who was employed as driver of an engine upon such temporary railway received injuries through a collision, which was caused by the negligence of another engine driver employed by the defendant in the management of an engine and trucks under his control. The county court judge gave judgment for the plaintiff.

Douglas Kingsford, moved, by way of appeal, for a rule nisi for a new trial, or to enter judgment for the defendant. The 5th

sub-section of the 1st section of the Employers' Liability Act, 1880, provides that a workman shall have the same right of action for personal injuries as if he had not been in the service of the employer where the injury is caused: "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." It is contended that this language does not apply to a temporary railway or tramway like that in the present case, but to a completed railway such as would come within the definition in 3 & 4 Vict. c. 97, s. 21.

[He cited *Matson* v. *Baird* (1), and *Reg.* v. *Bradford.* (2)]

POLLOCK, B. I think there should be no rule. Using words in their ordinary sense, it cannot be said that the person, through whose negligence the plaintiff's injury was caused, was not in charge of a locomotive engine on a railway. It is argued, however, that, taking into consideration the other words used in the sub-section such as "signal," "points," "train," the sub-section must be taken to refer only to a railway worked by a railway company under statutory powers and subject to the regulations by which such railways are governed. I can see no reason for thus restricting the natural sense of the words. There are many railways used by colliery owners and others upon which trains run, and there seems to be nothing in the words of the Act to limit its application to railways used by railway companies. The words used in the section are "negligence of any person in the service of the employer," and the definition of "employer" includes a body of persons corporate or unincorporate.

HUDDLESTON, B. I think the word "railway" is used in its popular sense, viz., as meaning a way upon which trains pass by means of rails. I therefore agree that there should be no rule.

Rule refused.

Solicitors for defendant: *G. H. K. & G. A. Fisher.*

(1) 3 App. Cas. 1082. (2) Bell's C. C. 268.

E. L.

1883
Feb. 14.

HISCOCKS *v.* JERMONSON.

Industrial Schools Act, 1866 (29 & 30 *Vict. c.* 118), *s.* 14—*Industrial Schools Act Amendment Act*, 1880 (43 & 44 *Vict. c.* 15), *s.* 1—*Living in House resided in by Prostitutes.*

A child under fourteen who lives with and under the guardianship of her mother in "a house resided in by prostitutes" may be ordered to be sent to an industrial school under 29 & 30 Vict. c. 118, s. 4, although there is no evidence of any act of prostitution on the part of the mother.

Case stated by a metropolitan police magistrate.

By the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 14, it is enacted as follows: "Any person may bring before two justices or a magistrate any child apparently under the age of fourteen years that comes within any of the following descriptions, namely—

"That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale anything), or being in any street or public place for the purpose of so begging or receiving alms;

"That is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence;

"That is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment;

"That frequents the company of reputed thieves.

"The justices or magistrate, before whom a child is brought as coming within one of those descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school."

By the Industrial Schools Acts Amendment Act, 1880 (43 & 44 Vict. c. 15), s. 1, "sect. 14 of the Industrial Schools Act, 1866, shall be read and construed as if, after the four several descriptions therein contained, there were added the following descriptions, namely,—that is lodging, living, or residing with common

or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution. That frequents the company of prostitutes."

On the 20th of June, 1882, William Hiscocks, an officer of the London School Board, applied to one of the London police magistrates for an order under the above sections that one Minia Jermonson, a girl of nine years of age, should be sent to the Alresford Industrial School. The girl lived with her mother, and when taken possession of by the said officer she and her mother were alone in a room in the house. It was proved that the house in which the mother was a lodger was a brothel, and that seven prostitutes were then living there, but no evidence was given of any act of prostitution on the part of the mother of the child, nor that she was conducting herself as a prostitute. The mother of the child was not a party to the proceedings before the magistrate, nor was there any evidence that she was aware of them. It was contended on the part of the applicant Hiscocks that the child was within the words and meaning of 43 & 44 Vict. c. 15, s. 1, as "living or residing in a house resided in or frequented by prostitutes for the purpose of prostitution." The magistrate declined to make an order, on the ground that the section was meant to meet the case of a child referred to in the second description contained in s. 14 of the Industrial Schools Act, 1866, who, though having a home or settled place of abode or proper guardianship, nevertheless has that home, abode, or guardianship with common or reputed prostitutes or in a house frequented by prostitutes for the purpose of prostitution, and that it did not apply to a child living with and under the care and protection of its mother, who is its lawful guardian; and on the further ground that the section did not contemplate the taking of a child from the custody of its mother for the purpose of sending it to an industrial school without her consent, or without giving her an opportunity of shewing cause to the contrary.

Jeune, for the School Board. The meaning of the Act is clear. The child lived in a house resided in by prostitutes, and cannot be exempted because her mother lived with her in the house.

1883

HISCOCKS v. JERMONSON.

No one appeared for the respondent.

MANISTY, J. This case must be sent back to the magistrate with an intimation that he was wrong in declining to make the order. The Acts are intended to protect young children in certain circumstances which are set out, and I think that if those circumstances are shown to exist the magistrate is bound to order the child to be sent to an industrial school. In this case it was proved that the child was under fourteen, and that she was living in a house frequented by and resided in by prostitutes; but the magistrate thought that because she was living in such a house with her mother he had no jurisdiction to make an order. But I cannot import such a limitation into the statute, nor would I do so unless compelled, as the object of this salutary legislation for the protection of young children would be defeated if such a restriction were placed on the operation of these clauses.

MATHEW, J. I am of the same opinion. To admit such an exception as is here contended for would place a restriction on the statute in favour of persons whose conduct deserves punishment rather than assistance.

Appeal allowed, and case remitted to magistrate.

Solicitors for appellant: *Gedge, Kirby, Millett, & Morse.*

J. R.

BURDICK *v.* SEWELL AND NEPHEW. 1883 *Feb.* 19.

Ship—Liability for Freight—Indorsee of Bill of Lading—"Passing of Property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 1.

The shipper of goods does not, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, "pass the property" in the goods to such indorsee so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1.

The shipper of goods indorsed the bill of lading in blank, and delivered it to the defendants' bankers by way of security for money advanced by them. The goods upon their arrival at the port of destination were sold for an amount insufficient to pay the freight:—

Held, that the property in the goods had not passed to the defendants within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1, so as to make them liable in an action by the shipowner for the freight.

ACTION by the plaintiff as owner of the steamship *Zoe* to recover 174*l.* 8*s.* 9*d.* as freight for the carriage of goods by the *Zoe* from London to Poti in Russia.

At the trial before Field, J., at Westminster, it appeared that the bill of lading for the goods had been indorsed in blank by the shipper and delivered to the defendants as security for an advance, under circumstances which are fully explained in the judgment. The case was reserved for further consideration.

1882. Nov. 25; Dec. 2, 12. *C. Hall, Q.C.* (*Edwyn Jones*, with him), for the plaintiff. The indorsement and delivery of the bill of lading to the defendants for valuable consideration had the effect of "passing the property" in the goods to them within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111. "The assignment of the bill of lading, the goods being at the time at sea, passes the whole and complete ownership of the goods": per Lord Hatherley, *Barber* v. *Meyerstein* (1); and Lord Westbury adds (2), "The handing over the bill of lading for any advance, under ordinary circumstances as completely vests the property in the pledgee, as if the goods had been put into his own warehouse." The dictum of Bramwell, L.J., in *Glyn* v. *East and West India*

(1) Law Rep. 4 H. L. 317, at p. 326. (2) Law Rep. 4 H. L. 317, at p. 335.

1883

BURDICK v. SEWELL.

Docks Co. (1) that the indorsement of the bill of lading for value is a mere pledge, and that no action could be maintained against the indorsees under the Bills of Lading Act for freight, is not supported by the judgments of the rest of the Court; and in the judgment delivered by Lord Blackburn in *Glyn, Mills, & Co.* v. *East and West India Docks Co.* (2) he expressly reserves the question whether the property of bankers, to whom a bill of lading has been indorsed for an advance, is or is not the whole legal property.

A. L. Smith, and *Danckwerts*, for the defendants. The effect of the transaction between the shipper of the goods and the defendants was merely to make the defendants pledgees of the goods. As pledgees they had a special property sufficient to enable them to maintain an action for the protection of their rights against any person wrongfully interfering with their security, as in *Barber* v. *Meyerstein* (3), but the property had not passed to them so as to make them liable for the freight under 18 & 19 Vict. c. 111: Benjamin on Sales, 2nd ed. p. 722. The difference between a pledge and a mortgage of chattels is well established: *Reeves* v. *Capper* (4); *Pigot* v. *Cubley* (5); *Donald* v. *Suckling.* (6) The question whether the indorsement of a bill of lading is intended to pass the whole property is one of fact, depending not merely upon the indorsement but upon the intention of the parties to be gathered from the circumstances of the cases. The dictum of Bramwell, L.J., in *Glyn* v. *East and West India Docks Co.* (1) has not been dissented from, and if followed is conclusively in favour of the defendants.

C. Hall, Q.C., in reply, referred to *Lickbarrow* v. *Mason.* (7)

Cur. adv. vult.

Feb. 19. FIELD, J., delivered the following judgment:—

This action was tried before me without a jury, and raises a difficult and important question as to the effect of the Bills of Lading Act, 18 & 19 Vict. c. 111, in transferring liability to

(1) 6 Q. B. D. at p. 490.
(2) 7 App. Cas. at p. 606.
(3) Law Rep. 4 H. L. 317, at p. 326.
(4) 5 N. C. 140.
(5) 15 C. B. (N.S.) 701.
(6) Law Rep. 1 Q. B. 585.
(7) 1 Sm. L. C. 7th ed. p. 756.

1883

BURDICK v. SEWELL.

freight from the shippers to the indorsee of the bill of lading. It was brought by the plaintiff, the owner of the ship *Zoe*, to recover 174*l.* 8*s.* 9*d.*, freight and charges, in respect of sixty cases of machinery shipped by one Nercessiantz, and carried to Poti in the Black Sea, under a bill of lading dated the 21st of September, 1880, whereby the goods were made deliverable to shipper "or assigns," and of which bill of lading the defendants became the indorsees under the following circumstances:—

On the 26th of October, 1880, Nercessiantz, who had been engaged in previous business transactions with the defendants, bankers of Manchester, applied to them for an advance of 300*l.* to enable him (as he said) to complete his payment in this country for the machinery represented by the bill of lading in question, which he had caused to be manufactured in this country to supply an order in Georgia, and as a security for the advance he proposed to indorse the bill of lading to them. He had, however, already (as he said) sent out one of the parts, and the defendants (whilst declining to make the full advance without the deposit of the third part) consented to advance 50*l.* conditionally upon his undertaking to procure and deposit the third part against the advance of the balance, by way of security for the whole. Accordingly, on the 30th of November, Nercessiantz brought the third part and deposited it indorsed in blank (the other two having been already indorsed), and obtained the balance of the advance, saying that he was shortly going out to Poti to superintend the receipt and delivery of the machinery, and that the amount advanced would be repaid before he left England, and that he would call again to make definite arrangements for that purpose This however he never did, and the defendants in consequence in the following month of February indorsed and sent out one part of the bill of lading to their agents at Tiflis, with instructions to make inquiries and protect their interests there. In the meantime, and as far back as September, 1880, the *Zoe* had arrived at Poti, and no one appearing to clear the goods they were on the 14th of October landed and warehoused at the Russian custom-house, with (as I infer) the usual stop for freight. Things remained in this state until the month of September in the following year, Nercessiantz not only not appearing to clear

1883

BURDICK v. SEWELL.

the goods, but taking no notice of the communications addressed to him by the agents of the ship, and also those of the defendants. By the Russian law goods landed and not cleared within twelve months are liable to be sold for duty and charges, the only mode of avoiding the sale being to reship the goods to some other than a Russian port, and in August, 1881, the defendants' agents at Tiflis advised them of this state of the law, and of the imminence of sale for these claims, and asked for instructions. The member of the defendants' firm who had made the advance to Nercessiantz, and was conversant with his affairs, was at this time on his way to Poti in reference to these and other matters of business there, and the defendants' firm in England wrote to the ship's agent at Poti advising him that they held the bills of lading, and that Mr. Sewell would probably communicate personally with them. This he appears to have done, and the defendants on the 28th of September also wrote to the plaintiff's agent in London to the same effect, and requested him to hold for them any proceeds of the sale beyond enough to answer their own freight and charges. The sale, however (which soon afterwards took place) by the Russian custom-house officials appears to have produced no more than sufficient for their own claim, and the plaintiff thereupon required payment of the freight and charges from the defendants, and on refusal, brought the present action.

Upon the argument before me it was contended on his behalf that the "property" in the bill of lading and goods, had under these circumstances passed to the defendants within the meaning of the Bills of Lading Act, and that they as indorsees were liable; the defendants on the other hand contending that the transaction was one of mere "pawn or pledge," by which no property passed sufficient to render the defendants liable. In order to say which of these two contentions ought to prevail, the intention of the parties to the contract, as gathered or to be implied from the circumstances of the transaction, must be looked at. Now advances against deposit of goods are probably some of the most ordinary transactions either of common or commercial life, and if there is delivery, and there are no terms expressed either verbally or in writing giving any larger effect to the contract, the latter is known as a contract by way of "pawn or pledge,"

the legal effect of which is that only a special property passes from the borrower to the lender, although coupled with the power of selling the pledge and transferring the whole property in it on default in payment at the stipulated time, if there be any, or at a reasonable time after demand and non-payment, if no time for repayment be agreed upon: *Pothonier* v. *Dawson* (1) and *Donald* v. *Suckling*. (2) Moreover, until such default, although the lender may assign the pledge to another to the limited extent of his own interest in it, i.e., as a security for the amount due, he cannot pass the whole and entire property in the goods to another, for by the contract the general property remains in the pawnor, who by virtue of that general property may determine the special property by tender of the secured amount, and may immediately recover the pledge on refusal in a possessory action. Delivery is however an essential element of every contract by way of pledge. Such delivery may be actual, as in the every day life transaction with the pawnbroker, or it may be constructive, either by making the custody of the pledgor that of the pledgee: *Reeves* v. *Capper* (3), or (if the goods are still under the operation of a bill of lading) by indorsement of the bill, and it is the latter form of the transaction which is one very commonly adopted in commerce. As, however, in the case of land, by a conveyance by way of mortgage, so also in that of goods, a more effective security may be created by bill of sale, and by the usual terms of such an instrument the whole and entire property in the goods is assigned and passes to the lender subject to usual stipulations as to possession and sale, but leaving nothing in the way of legal property in the borrower, only an equitable right to redeem. This latter form of security, although very usual in money lending transactions of a mere individual character, is not, I believe, usually adopted in those purely commercial transactions where advances are obtained against goods represented either by warrants or bills of lading; these being two of the ordinary modes by which goods are made a security for an advance and within one of which the transaction now in question must be ranged. The question in the present case resolves itself into whether the security was intended to

(1) Holt, N. P. 383. (2) Law Rep. 1 Q. B. 585.
(3) 5 N. C. 140.

1883

BURDICK v. SEWELL.

operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge. If the former, the whole and entire property would pass and as a consequence the liability to freight would be transferred to the defendants, for although as suggested by defendants' counsel it is highly probable that neither Nercessiantz or the defendants had in their minds at the time the liability to freight, yet if the latter took the security of a contract by which "the property passed" to them, they cannot take the good and reject the bad. On the other hand if the contract, although carried out by the indorsement of the bill of lading, remained merely a pledge, I think it clear that "the property" as expressed in the Act did not pass, for by those words I understand the whole and entire legal property, and not merely the limited interest which is transferred by the contract of pledge.

Now, the plaintiff's counsel contended that the former was the true effect of the indorsement, and he relied upon the opinion to that effect expressed by Brett, L.J., in the recent case of *Glyn, Mills, & Co.* v. *East and West India Docks Co.* (1) There, Brett, L.J., after adverting to the peculiar facts in that case, says: "The legal effect of the transaction, in my opinion, was that by the indorsement of the bill of lading the legal property in the sugar was transferred to the plaintiffs, and as between them and Cottam, Morton, & Co., a legal right to the immediate actual possession of the sugar by the plaintiffs on the arrival of the ship; but by the letter of charge there was left to Cottam, Morton, & Co., an equitable right to resume the legal and absolute ownership of the sugar on repayment of the advance, and an equitable right that the plaintiffs should not for a specified time exercise any rights of ownership over the sugar, but that Cottam, Morton, & Co. might exercise any such rights which would not be inconsistent with the validity of the plaintiff's security. The relation between two such parties was likened by Willes, J., in *Meyerstein* v. *Barber* (2) to that between a pledgor and pledgee of goods, where the goods under pledge are left in or given into the actual custody of the pledgor to be used by him, but are held to be, nevertheless, in the constructive possession, for the purpose of the

(1) 6 Q. B. D. 475, at p. 480. (2) Law Rep. 2 C. P. 38, at p. 51.

validity of the pledge of the pledgee, inasmuch as without such possession there could be no valid pledge, which was, nevertheless, intended to be valid. I think, however, that he was speaking of the likeness of the business view in the two cases and not of the legal view. To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow* v. *Mason* (1), namely, that such an indorsement passes the legal property. It is suggested that an indorsement of a bill of lading when accompanied by such a letter of charge has not the same fulness of effect in passing the property as if there were no such letter of charge. But upon consideration, I am of opinion that an indorsement of a bill of lading for an advance does by the mercantile law of England pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world, except some one who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which is still an equity though recognized by the Common Law Courts."

I apprehend, however, that the language of the learned Lord Justice in that case, must be read as applied to the facts of that particular case, and as I on the hearing of that case, which was tried before me without a jury, came to the conclusion that the intention of the parties and the implication of law from the dealings was that the whole and entire property did pass, I agree in the view of the Lord Justice thus limited and understood. I thought in that case of *Glyn* v. *East and West India Docks Co.* (2), that the indorsement, coupled with the terms of the indorsement of the 15th of May, and the transactions between the parties, did amount in effect to a mortgage, see *Flory* v. *Denny* (3), and that

(1) 1 Sm. L. C. 7th ed. 756.

(2) 5 Q. B. D. 129.

(3) 7 Ex. 581.

1883

BURDICK v. SEWELL.

the right of property as well as that of possession had passed to the plaintiff, and although my judgment was reversed in the House of Lords upon another ground (which the learned counsel for the plaintiff declined to argue before me), my view as to the property passing was supported by Baggallay, L.J., and Brett, L.J., dissentiente, however, Bramwell, L.J., and abstinente the House of Lords on the final appeal. Bramwell, L.J., however considered the transaction in that case of *Glyn* v. *East and West India Docks Co.* (1) as not amounting to anything more than a pledge, expressing his view of the transaction in these words: "I do not think that the property in the sugars was passed to the plaintiffs with an equity of redemption, or some other equity in Cottam & Co. I think that what took place was a pledge at common law with a right in the plaintiffs to sell in certain events, and with a common law right to redeem in Cottam & Co. I think if there had been instead of a symbolical, an actual delivery of goods from Cottam & Co. to the plaintiffs on the same terms, as for instance, of a case of diamonds, that the general property would not have been transferred, but would have remained in Cottam & Co., the plaintiffs having only a special property and right of possession. I cannot think that any action could have been maintained against them under the Bills of Lading Act for the freight, or any action by the dock company for warehouse rent, or charges, or otherwise, supposing such action would lie against some one; they did, however, by the handing over to them of the bill of lading, indorsed under the agreement, acquire a special property and right of possession. And I cannot doubt that as against an actual wrongdoer and against any person who had actually converted the sugars to his own use, as by their consumption and sale, or dealt with them under a claim of title, they might have maintained an action such as the present, as they would have been able to do, if the supposed case of diamonds had been taken from them and delivered to a person who sold them or used them, and would not give them up. Why, then, is not this action maintainable? The plaintiffs have a special property and the defendants have disposed of the goods in a way they had no right to do."

It is between these conflicting views of such high authority,

(1) 6 Q. B. D. at p. 490.

that I have to find my way to a result in the present case. In the view of the limited effect of the observations of Brett, L.J., which I have expressed, the learned counsel for the plaintiff did not concur. He contended it was the intention of the Lord Justice to enunciate the general proposition that by the law merchant of England, the necessary legal implication from, or the the effect of an indorsement of a bill of lading for an advance was that by it the whole and entire legal property passed, or at least said that is the true deduction from the case of *Lickbarrow* v. *Mason* (1) [referred to by the Lord Justice], as well as from subsequent authorities, and I proceed therefore, to the consideration of them.

In the last-mentioned case, the action was brought by an indorsee for value of a vendee against persons claiming under the vendor, and the question to be decided was whether under the circumstances the vendor could stop in transitu the goods comprised in the bill of lading, the vendee having become insolvent. The question therefore to be decided was not limited as in the present case and in that of *Glyn* v. *East and West India Docks Co.* (2) to the claim of two rivals immediately claiming title under the indorsement of different parts of the bill of lading, but as to the effect of a general and unrestricted indorsement to a third party claiming bonâ fide and for value, and without notice of any contract or equity existing between the immediate parties to the indorsement. The Court of Queen's Bench held that as between these parties the property passed to the indorsee free from any restriction, just as if the goods had been actually delivered to him, and gave judgment for the plaintiff. The Court of Exchequer Chamber reversed this judgment upon the ground that the operation of the indorsement was no more than an indication to the master of the person to whom the goods were to be delivered and that the indorsee had no better title than the indorser, and gave judgment for the defendant. This judgment of the Exchequer Chamber was, however, in its turn reversed by the House of Lords, presumably on the basis of the reasoning of Buller, J., in the opinion delivered by him in the House. But I do not understand that case as holding that as between the

(1) 1 Sm. L. C. 7th ed. p. 756.

(2) 6 Q. B. D. at p. 490.

1883

BURDICK v. SEWELL.

immediate parties, the law merchant implies that of necessity the indorsement has that operation, and indeed in the case of *Hibbert* v. *Carter* (1), Buller, J., upon whose reasoning the House of Lords decided the case of *Lickbarrow* v. *Mason* (2), seems to me to have laid down the contrary. *Hibbert* v. *Carter* (1) was an action on a policy of insurance with a denial of interest. The plaintiff had effected the insurance on instructions and "account" (as expressed in the policy) of Kerr, of whom he was the general consignee, but Kerr had before the insurance was effected unknown to the plaintiff indorsed the bill of lading to a creditor, Delpratt, and Buller, J., at the trial, there being no evidence of the circumstances attending the indorsement, held, that by this indorsement the whole property had passed to the latter and would have nonsuited the plaintiff, but that the defendants had omitted to pay the premium, for which premium therefore the plaintiff had a verdict. In Banc, however, the Court modified the general proposition thus apparently laid down, holding, that although generally where a bill of lading is taken by a creditor as a security for a debt the whole property passes; parties are always at liberty to vary this general rule by entering into any particular agreement between themselves, and upon evidence being given by affidavit that the consignor had no intention of passing the whole property to Delpratt by the indorsement, but merely intended to give him a charge upon the net proceeds in the plaintiff's hands, directed a new trial upon which the plaintiff had a verdict. Buller, J., before whom the case was again heard, says that the primâ facie transfer of the whole property is subject to be controlled by the evident intention of the parties. This case was thus decided before the case of *Lickbarrow* v. *Mason* (2), and was referred to by Buller, J., in that case, and with approval. It could not, therefore, have been his intention in *Lickbarrow* v. *Mason* (2) to have said anything in conflict with it, and if his language and that of the other judges who took part in that case, is read keeping this in mind, I do not think that Mr. Hall's contention is supported by that decision.

In *Lickbarrow* v. *Mason*, in the Court below, Ashurst, J., thus expresses himself: "When a man sells goods he sells them on

(1) 1 T. R. 745. (2) 1 Sm. L. C. 7th ed. p. 756.

the credit of the buyer, if he deliver the goods, the property is altered, and he cannot recover them back again though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and the vendee the contract is ambulatory till delivery; and therefore in case of the insolvency of the vendee in the meantime, the vendor may stop the goods in transitu. But as between the vendor and third persons the delivery of a bill of lading is a delivery of the goods themselves, if not it would enable the consignee to make the bill of lading an instrument of fraud." Then he says: "If the consignor had intended to restrain the negotiability of it he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument. So it is like a bill of exchange, in which case as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and the indorsee." Then he goes into the reasons of that and says: "The rule is founded purely on principles of law and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed, but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into, though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading." Therefore it seems that Ashurst, J., did not intend to lay down a general proposition that a mere indorsement of necessity passed the property, but only as between third parties. Mr. Justice Buller's judgment in that Court does not deal with the particular question, and I will advert presently to his opinion delivered in the House of Lords. Grose, J., says very much the same thing. He says "I conceive this to be a mere question of law whether as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does" (carefully guarding his proposition to that particular relation, and not giving it any greater effect). In the Exchequer Chamber Lord Loughborough delivered a very celebrated judgment, which was reversed no doubt, but that does not take away the value of it as a clear statement of his view. He reasoned upon different principles altogether; he took it that the bill of lading was a

1883

BURDICK v. SEWELL.

contract, as undoubtedly it is, between the shipper and the shipmaster, and is no contract with anybody else, that it contains merely the terms upon which the master says: "I receive the goods," and contains his undertaking to deliver them, so that it was no more than a receipt, or no more rather than a direction to the master as to whom he was to deliver the goods. He says this: "By the delivery on board the shipmaster acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods." Then he says: "Goods in pawn, goods bought before delivery, goods in a warehouse, or on shipboard, may all be assigned." And he winds up in the result by saying that it passes such right and no better as the person assigning had in it. No doubt Lord Loughborough's judgment has never been followed, and upon the contrary the judgment of Buller, J., has. When it came before the House of Lords there was a considerable difference of opinion (in those days, as now) five judges in the Exchequer Chamber differed with Buller, J., and there never has been a positive decision reported anywhere of the House of Lords, but the opinion of Mr. Justice Buller has always been taken as the law, and been adopted and followed as the law up to the present day. I refer to his language to shew that he only decides the point as between third parties and not between the immediate parties. He says, speaking of the case of *Godfrey* v. *Furzo* (1), upon which he commented a good deal: "The next point there stated is what is the law in the case of a pure factor, without any demand of his own? Lord King says he would have no property. The expression is used as between consignor and consignee, and obviously means no more than that in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is because in this case the factor is only a servant or agent for the merchant beyond sea. I agree if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property"

(1) 3 P. Wms. 185.

(Lord King held that no property passed by the indorsement of the bill of lading); and then he says: "But then it remains to be proved that a man who is in advance, or under acceptances on account of the goods, is simply and merely a servant or agent, for which no authority has been or, as I believe, can be produced." Then he says after going into the facts: "As between the principal and mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will: whether they be actually in the factors' possession, or only on their passage makes no difference, the principal may countermand his order, and though the property remain in the factor till such countermand, yet from that moment the property revests in the principal, and he may maintain trover." It is true in that case there was an informality, the result of which was that a venire de novo was directed, which came on for trial, and upon that occasion the jury found a special verdict, and Mr. Hall relied a good deal upon the terms of that special verdict. It is stated in *Lickbarrow* v. *Mason* (1) in these words: "A venire facias de novo having been accordingly awarded by the Queen's Bench a special verdict was found upon the second trial containing in substance the same facts as before, with this addition, that the jury found that by the custom of merchants bills of lading for the delivery of goods to the order of the shipper or his assigns are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person, and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person"—so that there is here no limitation either as to the parties or in reference to the operation of the bill of lading as a mere complement of delivery. But I apprehend that this also must be read as applied to the facts of that particular case, and Lord Tenterden considered unquestionably that the true effect of that case was in the limited way I have expressed it, as will be seen from the statement of it in Abbott on Shipping, 7th ed. p. 533, and 11th ed. p. 432, in which he says: "It is now the admitted doctrine of our Courts that the con-

(1) 1 Sm. L. C. 7th Ed. p. 756.

1883

BURDICK v. SEWELL.

signee may under such circumstances confer an absolute right of property upon a third person indefeasible by any claim on the part of the consignor." Those words shew in my judgment the limitation he put upon the proposition, that is to say—as between third parties—and *Lickbarrow* v. *Mason* (1) is no authority for extending the proposition to the immediate parties to the contract. But then the plaintiff relied upon observations made and language used by the learned Lords Hatherley and Westbury in giving judgment in the more recent case of *Meyerstein* v. *Barber*. (2) In that case the question did arise, as in this case, as to the effect of such an indorsement as between the immediate parties, and I cannot distinguish the facts in *Meyerstein* v. *Barber* (2) from those of the present case. There was in that case, as in this, simply an advance and deposit of an indorsed bill of lading by way of security, and no formal instrument of any kind executed. The question in that case arose thus, the plaintiff was indorsee of the bill of lading first in point of time, but taking only one part, and the only possession or right of possession which he had at the time of the conversion by the defendant was that which was given him by the indorsement. The defendant Barber, on the other hand, was indorsee by subsequent indorsement and delivery to him of the second part of the bill of lading, and he had clothed his title with possession by obtaining warrants in his own name and thus been guilty of a conversion. Upon the argument the plaintiff's case was that the indorsement was by way of pledge, and that by it a sufficient right of property had passed to him to entitle him to maintain trover against the defendant, and the defendant's argument, based upon the contention that both transactions were only by way of pledge, was that inasmuch as the plaintiff had not and the defendant had obtained delivery, which is, as I have before observed, the essential complement of a pawn, the latter had the better title. In the Court of Common Pleas, and also in the Exchequer Chamber, the transaction was treated by everybody as one of pledge, the language of Erle, C.J., Williams, J., and Martin, B., being expressly to that effect, and concurring in holding that the mere indorsement of the bill of lading was

(1) 1 Sm. L. C. 7th ed. p. 756. (2) Law Rep. 4 H. L. 317.

such a delivery of the goods as amounted to a valid pledge entitling the plaintiff to hold the goods as against Abraham, his indorser, and all claiming title under him, and the judgment was affirmed by the House of Lords. It is no doubt true that Lord Hatherley and Lord Westbury in expressing their advice to the House used expressions which appear to be to the effect that by the indorsement the whole and entire property passed to the plaintiff, and those passages are to be found in Law Rep. 4 H. L. 324. But reading those expressions as applicable to the particular facts of the case, I do not think that the learned Lords intended to say anything more than that as between the first and second indorsees sufficient property had passed to the plaintiff to entitle him to maintain the action, and that the indorsement per se amounted to a delivery. In expressing this view, Lord Hatherley indeed speaks of the transaction as a pledge, and it must be recollected that a mere pledge with its limited operation passes property quite sufficient to maintain a possessory action against a wrongdoer: *Ayers* v. *South Australian Banking Co.* (1) The decision in that case really was that under the circumstances the bill of lading had not fulfilled its office, and was therefore capable of assignment. In expressing this view of *Meyerstein* v. *Barber* (2), I am not unmindful of the expressions used by Brett, L.J., in the case of *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (3), in regard to that case and to which I have already referred. I am unable, with the greatest possible respect, to concur in that view of *Meyerstein* v. *Barber* (2), and it seems to me that the parties intended both as matter of law and business that the transaction in that particular case was a pledge.

Having considered these authorities, and a great many more which I do not cite, I have come to the conclusion that so far from supporting the proposition contended for by Mr. Hall, they shew that as between the immediate parties the intention must prevail, and in the present case I come to the conclusion upon the facts that the parties did not intend anything more than a pledge, i.e., not to take the whole property in the goods out of Nercessiantz, but to leave the general property with him,

(1) Law Rep. 3 P. C. 548. (2) Law Rep. 4 H. L. 317.
(3) 6 Q. B. D. at p. 490.

1883

BURDICK v. SEWELL.

contemplating that he would deliver the goods to the parties for whom he had bought them, and that the possession of the bill of lading would enable the defendants to stop their advance out of the proceeds by making them a necessary party to the delivery, or at the lowest to put it in their power to compel the borrower to redeem the pledge and thus obtain the only document by which the borrower could obtain delivery of the goods and perform his contract. If such is the true result of the facts the Bills of Lading Act does not apply, and I therefore am of opinion that no sufficient property passed to render the defendants liable.

The question in the present state of the authorities is no doubt not free from difficulty, and no one is more conscious than I am of the little practical value attaching to my judgment, but I have done the best I can to form a judgment, and it is for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendants: *Hare & Co.*

A. P. S.

March 3.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* FOOTE.

*Practice—Court of Appeal—Jurisdiction—Criminal Matter—Bail—*36 *&* 37 *Vict. c.* 66, *ss.* 19, 47.

A prisoner applied for bail to a Divisional Court of the Queen's Bench Division but was refused; he then appealed to the Court of Appeal:—

Held, that the decision of the Divisional Court was a judgment of the High Court in a criminal matter, and therefore that the Court of Appeal had no jurisdiction to entertain the appeal.

On the 1st of March, 1883, G. W. Foote, W. J. Ramsay, and H. A. Kemp were tried before Mr. Justice North at the Central Criminal Court for publishing a blasphemous libel in a newspaper called the *Freethinker*. The jury could not agree, and were eventually discharged, and Mr. Justice North appointed the 5th of March for a fresh trial before a different jury.

On the 2nd of March Foote and Ramsay applied to Mr. Justice

North to be admitted to bail, but the judge refused the application.

The same prisoners then applied to a Divisional Court of the Queen's Bench Division, consisting of Grove and Mathew, JJ., by way of appeal from North, J., and also on the ground that the Queen's Bench Division had inherent jurisdiction to grant bail in all cases, and that misdemeanour is always bailable as a right.

The Divisional Court having refused the application, the prisoners appealed to the Court of Appeal.

Iuer, for the appellants. An appeal lies to this Court from all decisions of the Divisional Court, except in cases expressly excepted by the Judicature Act. It is true that the 47th section of the Judicature Act, 1873, enacts that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent on the record," but that has reference to the subject-matter of the section, namely, the Court for Crown Cases Reserved. It only deals with judgments; it was not meant to include all applications in matters of a criminal nature which come before a Divisional Court in its ordinary jurisdiction. In *Reg.* v. *Weil* (1) the Court of Appeal entertained an appeal from the refusal by a Divisional Court of a writ of habeas corpus; although the question of jurisdiction was not decided in that case. But the application in the present case is not in a criminal matter, although it is incidentally connected with one.

[BAGGALLAY, L.J., referred to *Reg.* v. *Steel* (2), where it was held that no appeal lay from a decision of the Queen's Bench Division discharging an order to review a taxation of costs.]

The costs were there held to be a consequence of the judgment; but application for bail is quite unconnected with the judgment.

JESSEL, M.R. I am of opinion that this application must be refused. The point raised is a very important one, namely, the jurisdiction of this Court in criminal matters. The first question is, whether the last clause of s. 47 of the Judicature Act, 1873, is

(1) 9 Q. B. D. 701. (2) 2 Q. B. D. 37.

1883

THE QUEEN v. FOOTE.

general and relates to the High Court in its ordinary jurisdiction and not only to the Court for Crown Cases Reserved. That was decided by the Court of Appeal in *Reg.* v. *Steel* (1), and I see no reason to differ from that decision, even if we were not bound by it. The next question is, whether the word "judgment" in the same clause is used in a general or in a technical sense, as confined to final judgment in criminal cases. I am of opinion that it is used in the larger sense, of all decisions in criminal matters. That also was decided in *Reg.* v. *Steel* (1), where it was held that an order respecting the taxation of costs in a criminal information came under the meaning of the word. The last question is whether this is a "criminal cause or matter." I entertain no doubt that it is. A person was tried for a misdemeanour, the jury were discharged, because they could not agree, and a fresh trial was appointed. Then the prisoner applied to be admitted to bail. This being refused, an appeal is brought to this Court. If this is not a criminal matter it is difficult to see what is one. This Court has no jurisdiction to entertain the appeal, and it must therefore be dismissed.

BAGGALLAY and LINDLEY, L.JJ., concurred.

Solicitors: *Harper & Battcock.*

(1) 2 Q. B. D. 37.

M. W.

[CROWN CASE RESERVED.]

1883
March 3.

THE QUEEN *v.* BROWN.

Attempt to Murder—Murder, Attempt—24 & 25 *Vict. c.* 100, *ss.* 14, 15.

B. drew a loaded pistol from his pocket for the purpose of murdering S., but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand, and he was at once arrested:—

Held, by the Court (Lord Coleridge, C.J., Pollock, B., Huddleston, B., Manisty and Stephen, JJ.), that the offence was not within s. 15 of 24 & 25 Vict. c. 100, under which section the prisoner had been tried and convicted.

Semble, that the offence was within s. 14 of 24 & 25 Vict. c. 100.

Reg. v. *St. George* (9 C. & P. 483), and *Reg.* v. *Lewis* (9 C. & P. 523), doubted.

THE following case was stated by Stephen, J., for the consideration of this Court:

"At the December session of the Central Criminal Court, Samuel Brown was convicted before me upon the first count of an indictment then preferred against him. The count (omitting formal parts) was in these words:—

"Samuel Brown, on the 23rd of November, 1882, 'feloniously did attempt to discharge certain loaded arms (to wit a certain pistol loaded in the barrels with gunpowder and divers leaden bullets) at and against one William Sutton, with intent in so doing feloniously, wilfully, and of malice aforethought of him the said Samuel Brown, to kill and murder the said William Sutton.'

"The facts were as follows: Brown had a quarrel with Sutton. On the day in question he went to Sutton's house and desired to speak with him in private. Sutton told Brown to go into the back shop for that purpose, but having some suspicion made Brown go first. Brown, as he went into the shop, was observed to draw from his pocket a loaded revolver. Sutton's nephew, Collins, immediately snatched it from his hand, and he was arrested by Sutton and Collins. On his way to the police station he said that he had not forgotten the way in which Sutton had previously treated him.

"In order to explain my direction to the jury, it is necessary to observe that though it concludes 'against the form of the statute,'

1883] THE QUEEN v. BROWN.

the count on which Brown was convicted does not follow the words of either of two sections of the Offences against the Person Act, each of which bears upon the subject. The material parts of these sections are as follows: 24 & 25 Vict. c. 100, s. 14, punishes several different ways of attempting to commit murder, one of which is, 'Whosoever shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person with intent to commit murder.' Section 15 punishes every one who 'by any means other than those specified in any of the preceding sections of this Act attempts to commit murder.'

"In *Reg.* v. *St. George* (1) it was held that the words 'by drawing a trigger or in any other manner,' meant in any other manner like drawing a trigger, as e.g., by striking a percussion cap with a hammer, and that an attempt to discharge a pistol by attempting to pull a trigger, was not an offence within the Act then in force, which was in the same words as s. 14. I held, accordingly, that there was no evidence to go to the jury of any offence under s. 14. I thought there was evidence to go to the jury of an offence against s. 15, but I doubted whether the prisoner could be convicted of such an offence upon the count as drawn. In these circumstances I directed the jury as follows: I told them that an attempt to commit a crime might, at least for the purposes of the case, be defined as an act done with intent to commit a crime so closely connected with the actual commission of the crime as to form one of a series of acts which, if not interrupted, would constitute collectively the actual commission of the crime; and in reference to the particular case I told them that if they thought Brown intended to murder Sutton, and drew the pistol from his pocket for that purpose, and was prevented from murdering Sutton, or from firing the revolver at him for that purpose, only by its being taken from his hand they ought to convict him on the count above-mentioned, which I held, for the purposes of the trial, to be a count charging at attempt to murder by means other than those specified in ss. 11, 12, 13, and 14, of 24 & 25 Vict. c. 100. The jury convicted the prisoner, and I reserved judgment and committed him to prison until this case should have been decided by the Court for Crown Cases Reserved.

(1) 9 C. & P. 483.

1883

THE QUEEN v. BROWN.

"The questions for the Court are: 1. Whether, assuming the sufficiency of the indictment, my direction to the jury was right. 2. Whether the indictment sufficiently charged an offence under s. 15.

"If either of these questions is answered in the negative the conviction must be quashed. If both are answered in the affirmative it must be confirmed."

No counsel appeared for the prisoner.

Poland, for the prosecution. Upon the authority of *Reg.* v. *St. George* (1) the learned judge ruled that the present case was not within s. 14 of 24 & 25 Vict. c. 100, and the reason of the decision in that case was that the words "in any other manner" are to be construed to cover only attempts ejusdem generis with drawing a trigger. It would seem from that case that attempting to pull a trigger is not an act falling within s. 14, and if so it follows that taking a pistol out of a pocket merely does not fall within it.

[STEPHEN, J. I considered myself bound by that case, and therefore upon the trial the question was whether s. 15 applied.]

Then taking it that s. 14 did not apply, it must be that s. 15, which was the section on which the prisoner was tried, does apply.

[LORD COLERIDGE, C.J., referred to *Reg.* v. *Lewis.* (2)]

The 15th section covers all attempts to murder not within the 14th section, and here the jury have found, and rightly, that there was an attempt to murder.

[HUDDLESTON, B. I cannot help thinking that this case is within s. 14.]

If it is, it is not within s. 15.

LORD COLERIDGE, C.J. I am of opinion that this conviction cannot be sustained. The indictment having been clearly an indictment drawn in the words of and in reference to s. 14, and it having been held by our learned Brother, in obedience to two decisions in the 9th volume of Carrington and Payne's Reports, that it was not within that section, it cannot be brought

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

1883

THE QUEEN v. BROWN.

under s. 15. I do not at all doubt, as I said in the course of the argument, what my learned Brother said about these sections. He knows these things, as we all know, with great particularity, and has gone into them, more than any other member of the bench. The true construction of these sections, it seems to me put broadly is this, that there are a variety of means by which murder may be attempted, and there are a variety of things that may be done with intent to commit murder. Those are described, "explosion of gunpowder, setting fire to a ship, suffocation, attempt to discharge firearms." All those things if done with the intent to murder are within the various sections which deal with those respective attempts; and then the 15th section goes on to say that whosoever attempts to murder by any other means shall also be within the mischief of the Act of Parliament. In the infinite variety of human affairs, it being impossible to specify every mode of attempting to commit murder, a general clause is put in, saying if a man attempts by any other means to commit murder, he shall be within the mischief of the Act of Parliament; but then it seems to me those must be means not ejusdem generis with the means pointed at in the earlier sections. This it appears to me is a means ejusdem generis with that pointed at in the 14th section; it is a means that has been held by decision not to be within the 14th section, and I cannot think that the 15th section was meant merely to extend the 14th. I should rather say it was not meant at all to extend the 14th. The 14th section dealt with one mode of attempting to commit murder, the 13th with another, the 12th with another, and the 11th, if I remember rightly, with another, and then the 15th with any other means not ejusdem generis with the means specified in those earlier sections. I am therefore of opinion that as this has been held not to be within the 14th section, and that matter is not submitted to us, it cannot be held now to be within the 14th section, and it is clearly not within the 15th section. I believe I speak with the assent of my learned Brothers in saying this—I certainly myself desire to say it—that if upon a fit occasion the case of *Reg.* v. *St. George* (1), and the case of *Reg.* v. *Lewis* (2), should come up for consideration, whatever

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

may be the authority of the learned judges by whom those cases were decided, and it is needless to say higher authority could scarcely be had, the consent of my own mind is not given to them. I might be bound by them if sitting alone, but sitting in this court, I should take the liberty to reconsider those cases, and possibly to overrule them.

POLLOCK, B. I have come to the same conclusion, but with great regret, because if it were open to me to consider whether this case was not within the 14th section, I should very much like to reconsider the decision in the case of *Reg.* v. *St. George* (1) which has been referred to. But that is not open to us now. Upon the only question that is open to us in my judgment, it would be a wrong construction to put upon the 15th section, which provides for any means other than those specified in the preceding sections, to say that this case comes within those provisions. That being so, it seems to me this conviction must be quashed.

HUDDLESTON, B. I am of the same opinion, and I quite agree it would be desirable to reconsider the case of *Reg.* v. *St. George* (1) and the case of *Reg.* v. *Lewis.* (2) When the proper time comes I hope those cases will be brought before this Court. I think this conviction must be quashed. Now I do not refer to the 11th, 12th, and 13th sections of this Act. They point to murder, but the 14th section is applied to attempts to murder by administering poison, or shooting, or attempting to shoot, or attempting to drown, &c., with intent to murder. Those are the heads of attempting to murder which are contemplated by the 14th section. Then the 15th section says, "any other means." This is clearly a shooting at and an attempt to murder in that way, but the decisions have held that the evidence does not go far enough to enable the prisoner to be convicted under that 14th section. He clearly comes within it, and to my mind it cannot be said, that this attempt to murder, which is contemplated by the 14th section, may be brought within the 15th by

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

1883

THE QUEEN v. BROWN.

saying it is a means other than that specified in the earlier sections of the Act.

MANISTY, J. I am of the same opinion. The means stated in the indictment are means expressly within the 14th section, namely, attempting to discharge loaded arms, with intent to commit murder. That is the charge in the indictment, and those are the very words of the 14th section. How can we say then that the case is within the 15th, which applies to cases other than those mentioned in the 14th? I confess I quite agree, if I may say so, with my Lord Chief Justice, that when *Reg.* v. *St. George* (1) and *Reg.* v. *Lewis* (2) come before the Court, it will be a matter for serious consideration whether they can be maintained. The difficulty is how to deal with a case of this sort when it arises at the assizes, but probably means will be found for raising the question without allowing the prisoner to escape, should such a case occur.

STEPHEN, J. I am of the same opinion. I reserved the case because there appeared to me to be considerable obscurity about the precise effect of that 15th section, and because it did not occur to me at the moment to adopt the test which I think is conclusive as to its meaning. When you come to read the one section as part of the other I think that the matter becomes perfectly clear. It is a felony, amongst other things, to shoot at any person with intent to commit murder, or to attempt to discharge loaded arms at him with the like intent. Then also it is felony to commit murder by any means other than those specified in the 14th, amongst other sections, and if you read that last or 15th section fully, it is this, that it is a felony to attempt to commit murder by any means, other than shooting at any person or attempting to discharge a gun at any person by drawing a trigger, or by similar means. Now the means by which Brown attempted, if he attempted at all, to commit murder, was undoubtedly shooting at the prosecutor. But it has been decided that he does not come within the 14th section, because he did not actually shoot at that person, or attempt to shoot at him in

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

1883

THE QUEEN v. BROWN.

the ways specified in the 14th section. The consequence is that he escapes between the two sections. I cannot help myself thinking that a very much simpler enactment would have suited every purpose, and would have dispensed with these very intricate sections. However that is not the matter we have to consider.

With regard to the cases of *Reg.* v. *St. George* (1) and *Reg.* v. *Lewis* (2), I wish merely to say that I neither assent or dissent to what has been said, and in the view I take I shall reserve my opinion and say nothing as to them.

Conviction quashed.

Solicitor for prosecution: *The Solicitor to the Treasury.*

C. D.

DICK AND ANOTHER *v.* BADART, FRERES.

March 3.

The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 83—*Dock Company—By-laws, Validity of—Ship—Discharge of Cargo—Employment of Lumpers.*

By 10 & 11 Vict. c. 27, s. 83, the undertakers authorized by any special Act to construct a dock may from time to time make such by-laws as they shall think fit for (amongst other purposes) regulating the shipping, unshipping, and removing of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well the servants of the undertakers as others, employed in the dock. A dock company, who were the undertakers under a special Act, made by-laws that no lumpers should be allowed to work on board any vessel in the dock, but such as were authorized by the company, unless permission in writing had been previously obtained from the superintendent of the dock, and that servants of the company only should be allowed to work within the dock premises, whether on ship, lighter, or shore:—

Held, that the by-laws were in excess of the power conferred upon the dock company by s. 83, and were therefore invalid.

FURTHER CONSIDERATION.

Claim, under a charterparty, for two days' demurrage of the plaintiffs' ship.

Defence, that the defendants, who were assignees of the bill of lading from the charterers, did not delay the ship over and above

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

1883

DICK v. BADART.

the lay days as alleged, and that the delay (if any) occurred solely through the acts and defaults of the plaintiffs; and counter-claim for damages from the plaintiffs for neglecting and refusing to deliver the cargo to the defendants on the ship's arrival at the port of discharge, according to their contract, although the defendants were ready and willing to receive it.

Issue joined on the defence and counter-claim.

At the trial before Cave, J., during the Michaelmas sitting, 1882, at Guildhall, the material facts were as follows:—

By a charterparty, dated the 7th of January, 1882, the plaintiffs' steamship *Homer* was chartered to proceed to Alexandria, and there load from the charterers a cargo of cotton seed, and therewith proceed to a safe port in the United Kingdom and deliver the same. Eleven working days (weather permitting) to be allowed the charterers for loading and discharging the ship and ten days on demurrage, if required, at 6*d.* per ton per day.

On the 31st of January, 1882, the charterers' agents at Hull sold to the defendants for and on account of the charterers a cargo of Egyptian cotton seed, which by the terms of the sold-note was "for shipment per steamer during the second half of February next to a direct port of the United Kingdom. Orders to be given on signing bill of lading . . . . the seed to be worked immediately on arrival of steamer at port of discharge."

The *Homer* was loaded with cotton seed in pursuance of the charterparty and the charterers' contract with the defendants, and the bill of lading, signed on the 24th of February, 1882, stated that the ship was "bound for London direct, Commercial Dock," and that four working days of the lay days remained. The bill of lading was indorsed by the charterers' agents to the defendants.

On Thursday, the 16th of March, the ship arrived in the Commercial Dock, the plaintiffs having on the previous day given notice to the defendants that the cargo would be discharged by the ship's crew. On the ship's arrival the plaintiffs gave verbal notice to the defendants that the ship would be ready to discharge the following morning, and accordingly the ship was made ready to discharge early on the morning of the 17th, the master having re-engaged some of the crew, and having also engaged a gang of

lumpers to discharge the cargo. Lighters for the reception of the cargo from the ship came alongside on the 17th, but the defendants sent no inspectors on board on that day. It is the practice to weigh cotton seed on the deck of the vessel at the time of delivery. It was admitted that it was the duty of the shipowner to provide men for discharging the cargo, and that it was the duty of the consignee to provide weights, scales, and weighers. The defendants, on the 16th, applied to the superintendent of the dock to place weights, scales, and weighers on board the *Homer*, but he refused so to do unless the plaintiffs agreed to allow the cargo to be discharged by persons employed by the dock company in accordance with the company's by-laws. (1)

(1) By s. 33 of the Harbours Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), "upon payment of the rates made payable by this and the special Act" (which by s. 2 means any Act hereafter passed authorizing the construction of any dock, and with which this Act shall be incorporated), "and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods."

Sect. 81: "Where under the special Act the undertakers shall have the appointment of meters and weighers, the undertakers may appoint and license a sufficient number of persons to be meters and weighers within the limits of the harbour, dock, and pier, and remove any such persons at their pleasure, and may make regulations for their government, and fix reasonable rates to be paid, or other remuneration to be made to them for weighing and measuring goods."

Sect. 82: "When a sufficient number of meters and weighers have been appointed by the undertakers, under the powers of this and the special Act, the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour, or dock, or pier, shall not employ any person other than a weigher or meter licensed by the undertakers or appointed by the Commissioners of Customs to weigh or measure the same, and if in such case any person other than a meter or weigher licensed by the undertakers, or a meter or weigher appointed by the Commissioner of Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall be liable to a penalty not exceeding five pounds, and the weighing or measuring of any such goods by any such person shall be deemed illegal."

Sect. 83: "The undertakers under a special Act may from time to time make such by-laws as they shall think fit for all or any of the following (amongst other) purposes:—

"For regulating the use of the harbour, dock, or pier;

"For regulating the shipping and unshipping, landing, warehousing, stowing, depositing, and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers;

"For regulating the duties and conduct of all persons, as well the servants of the undertakers as others, not being officers of customs or excise who shall

1883

DICK v. BADART.

Nothing further was done until the afternoon of Saturday, the 18th, when the superintendent sent weights, scales, and weighers on board. The master of the *Homer* thereupon ordered his crew and lumpers to begin discharging into the lighters which were still alongside, but evidence was given that the dock company's servants prevented this being done. Correspondence took place between the parties during the period of delay, and on the 20th of March the plaintiffs wrote to the defendants repeating an offer previously made "to deliver the cargo on bill of lading weight, or to supply weights, scales, and men to weigh the cargo, or to accept your men's weights, or to take the vessel into the river, and deliver the cargo on city meter's weights."

The defendants replied as follows:—"In reply to your letter of this day we beg to say that we have been ready from the first arrival of the *Homer* to take delivery of the cargo, and have given the necessary weighing order to the dock company. The several

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be employed in the harbour, dock, or pier, and the premises of the undertakers;

"For regulating the use of the cranes, weighing machines, weights and measures belonging to the undertakers, and the duties and conduct of all weighers and meters employed by them;

"For regulating the duties and conduct of the porters and carriers employed on the premises of the undertakers, and fixing the rates to be paid to them for carrying any goods, articles, or things from or to the same. And the undertakers may from time to time, as they shall think fit, repeal or alter any such by-laws, provided always that such by-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or of the special Act."

The dock company's special Act (the Surrey Commercial Dock Act, 27 Vict. c. xxxi.), incorporated part (including ss. 33, 81, 82 and 83) of 10 & 11 Vict. c. 27.

By s. 115 of the special Act the company may from time to time appoint and license so many persons as the company think sufficient to be meters and weighers within the limits of the docks. By s. 116 the company may demand and take for the use of their weighing and measuring machines . . . . such reasonable rates as the company from time to time appoint.

The company's by-laws provided that "No lumpers are allowed to work on board any vessel in the docks, or on the wharves or premises of the company, but such as are authorized by the company, unless permission in writing be previously obtained from the superintendent. And for every breach of this by-law the person offending is liable to a penalty of not exceeding 5*l.*;" and "only servants of the dock company are allowed to perform any work within the dock premises, whether on ship, lighter, or on shore," with certain specified exceptions which did not apply to lumpers.

propositions you place before us we cannot entertain, the cargo being, as you know, consigned to the Commercial Dock we have no power to alter or interfere in its destination, but to comply only with the terms of the charterparty and bill of lading, and the rules of the dock company."

In consequence of the action of the company the cargo remained undischarged until the evening of Monday, the 20th, when the plaintiffs, having agreed with the dock company that the company's own servants should be employed to discharge the cargo at a reduced rate, the lumpers were sent on shore, and the discharge commenced and continued till Friday, the 24th, when the ship was cleared of all cargo.

The plaintiffs claimed two days' demurrage in respect of the delay caused as mentioned above.

In answer to questions left to them by the judge, the jury found that the dock company refused to provide weights, scales, and weighers for the discharge of the *Homer's* cargo, and so prevented the discharge.

Cave, J., reserved for further consideration the question whether or not the by-laws, under which the dock company refused to allow the *Homer's* cargo to be discharged by lumpers, were valid.

Finlay, Q.C., and *Albert Gray*, for the plaintiffs. The plaintiffs were entitled to employ lumpers to discharge the cargo, and the company's by-laws prohibiting shipowners from so doing are invalid, being in excess of the powers given by s. 83 of 10 & 11 Vict. c. 27. The power given by s. 83 to make by-laws for regulating the duties and conduct of persons employed in the dock, does not include a power to exclude entirely a certain class of persons from the dock. These are by-laws in restraint of trade, and unreasonable, because under them the company claim a monopoly to employ labour, and may charge any price they think fit for it. Sects. 81 and 82 afford a strong argument against the existence of such powers, shewing that special provisions were thought necessary to give the company power to select the weighers and meters employed in the dock and fix their charges. [They referred to *Calder and Hebble Navigation Co.* v. *Pilling*. (1)]

(1) 14 M. & W. 76.

1883

DICK v. BADART.

Mellor, Q.C., and *Hollams*, for the defendants. The words of s. 83 are large enough to give the dock company power to make the by-laws in question. The object of the legislature was to enable the undertakers to protect goods within their dock. They can best do so by employing their own servants only to discharge cargo. By s. 85 of the general Act no by-laws made under that or the special Act shall come into operation until confirmed in the prescribed manner, and if no manner of confirmation be prescribed (as none was in this special Act), then they are to be allowed and signed by one of the judges of the superior Courts. The public are therefore protected against the improper exercise of the monopoly to discharge cargo by the company's own servants.

CAVE, J. I have come to a decided opinion in this case. The question is whether or not the dock company's by-law prohibiting the employment by shipowners of lumpers for the purpose of discharging cargo in the dock is valid. The answer must depend upon whether or not the making of the by-law is within the powers conferred upon the company by s. 83 of the General Act (10 & 11 Vict. c. 27), because the company's power to make by-laws is limited by that Act, and they have no other general power. Sect. 33 of the general Act provides that upon payment of the rates made payable by that and by the special Act, and subject to the other provisions thereof, the harbour, docks, and pier shall be open to all persons for the shipping and unshipping of goods. To my mind that provision must include not only shipowners and owners of goods, but also their respective servants, whether usually employed otherwise than in the docks or not. Primâ facie, therefore, one would not expect to find any by-law empowering the dock company to exclude any definite class of men from the docks. Then comes s. 83, which states the matters in respect of which by-laws may be made. For the defendants it was contended that the words "for regulating the shipping, unshipping, landing, and removing of all goods within the limits of the harbour, dock, or pier," were in form wide enough to include the persons by whom the goods were to be moved. However that might be if the clause stood alone, I think it is quite clear that

it has not the extent contended for when the other clauses of the section are looked at. The 6th clause empowers the company to make by-laws for regulating the duties and conduct of all persons, "as well the servants of the undertakers as others," employed in the docks, shewing that persons may be employed in the docks who are not the company's servants. That clearly does not authorize a by-law to exclude lumpers. A by-law that lumpers should only be employed subject to good character might be within the company's power to regulate the duties and conduct of persons employed in the dock, but a by-law by which lumpers are altogether excluded from the dock could not possibly be within it. Again, the clause by which the company are empowered to regulate the conduct of all meters and weighers appointed by them bears out my view. The special Act authorizes the company to appoint their own meters and weighers, and by the general Act (ss. 81 and 82), where under the special Act the undertakers shall have the appointment of meters and weighers, they may license a sufficient number of persons to be meters and weighers within the limits of the dock, and fix reasonable rates or remuneration to be paid to them, and none but the licensed meters and weighers are to be employed to weigh goods in the dock. If it had been intended to limit the class of persons who might remove cargo to persons employed by the company only, one would have expected to find similar provisions with respect to those persons. There are no similar provisions to take away from the shipowner the right to employ his own lumpers, and there being no restriction in that respect, the general provisions of s. 33 apply, and the employment of other persons than the company's servants is authorised by the Act.

By another clause of s. 83 the undertakers may regulate the duties and conduct of porters and carriers employed on their premises, and may fix the rates to be paid to them for carrying any goods from or to the same. That clause also refers to persons not in the employment of the company, and though it may be reasonable that the company should have power to fix the rates to be paid to those persons, it would hardly be reasonable that the company should have the absolute power of fixing the rates to be paid to themselves. It is to be observed that the Acts nowhere

1883

DICK v. BADART.

give them power to fix their own rates, which are in all cases fixed by the special Act. I am also confirmed in my view by the consideration that the special Act does not fix any rates for unloading cargo, so that if the company could exclude all persons except their own servants they would have a monopoly of the labour, in respect of which they could charge the shipowner any rate they thought fit. For these reasons I am of opinion that the defendants have failed to make out that the by-law was within the dock company's powers. I think it was in excess of their powers, and therefore that the plaintiffs are entitled to succeed.

Judgment for the plaintiffs on claim and counter-claim.

Solicitors for plaintiffs: *Stibbard, Gibson, & Co.*
Solicitors for defendants: *Hollams, Son, & Coward.*

W. A.

March 6.

MAUDE AND OTHERS, APPELLANTS; THE BAILDON LOCAL BOARD, RESPONDENTS.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150 —*Justices*—"*Street*," *Definition of*—*Finding of Fact by Justices.*

By s. 4 of the Public Health Act, 1875, "in this Act, if not inconsistent with the context, the following words and expressions have the meaning hereinafter respectively assigned to them," and (amongst other definitions) "street includes any road," &c. By s. 150, "where any street within any urban district (not being a highway repairable by the inhabitants at large)" is not sewered, paved, and channelled to the satisfaction of the urban authority they may give notice to the owners of the adjoining premises to sewer, &c., the street, and on failure to comply with the notice the urban authority may execute the works themselves, and recover the expense of so doing from the adjoining owners in a summary manner. Summary proceedings having been taken by an urban authority to recover, under s. 150, the expense of sewering, &c., a road within the district which was not a highway repairable by the inhabitants at large:—

Held, that it was a question of fact for the justices to determine whether or not the road was a street within s. 150, and that they were not bound to find as matter of law that it was a street by the terms of the definition in s. 4.

CASE stated by two justices of the West Riding of York under 20 & 21 Vict. c. 43.

The respondents, who were the urban sanitary authority of the district of Baildon, preferred complaints against the appellants,

as owners respectively of premises fronting a road called West Lane, within the district, to recover, under s. 150 of the Public Health Act, 1875, their proportion of the expense of sewering, paving, and channelling the road.

At the hearing the justices made an order for payment of the amount claimed, and on the application of the appellants stated a case setting out the following material facts:—

The road in question led out from the westerly end of the village of Baildon. Part of it was laid out as a cart-road, but from a period long prior to 1835 the public had enjoyed a right of way on foot and on horseback along the whole length of the road. The whole of the road had been repaired for a period of sixty years and upwards by the owners of land on the northerly side thereof (the appellants' premises were situate on the south side), no repairs having been done by the respondents, by the highway authority, or by the parish authority. There were numerous houses on each side of the road at the end leading out from Baildon, but there were only two houses along the remaining part, which constituted by far the greater length of the road, and the land on each side was of an agricultural character.

The case also stated that the justices held "that the road in question was a street within the meaning of s. 150 of the Public Health Act, 1875, as being within the definition of the word 'street' given by s. 4 of that Act."

The question for the opinion of the Court was whether the justices' determination upon the construction of the points arising under the Public Health Act was correct in point of law, and if not, what should be done in the premises.

Upon the case coming for argument before a Divisional Court (Field and Stephen, JJ.), the Court ordered it to be remitted to the justices "to state whether the road in question was found as a matter of fact to be a street, or whether they considered themselves bound by the definition in s. 4 of the Public Health Act, 1875."

The justices answered by stating that they did not find the road as a matter of fact to be a street, but that they considered themselves bound by the definition in s. 4 of the Public Health Act, 1875, to declare it to be a street.

1883

MAUDE v. BAILDON LOCAL BOARD.

The case came before the Court again for argument.

Forbes, Q.C. (*H. E. Stansfield*, with him), for the appellants. The justices having found as a fact, in answer to the question of the Court, that the road is not a street, their decision is final and conclusive upon that point: *Reg.* v. *Dayman.* (1) Their order was therefore wrong. [He was stopped by the Court.]

Waugh (*W. Wills*, with him), for the respondents. Sect. 4 of the Public Health Act, 1875, enacts that "in this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them, that is to say, "'street' includes any highway (not being a turnpike road) and . . . . any road, lane, footway . . . . whether a thoroughfare or not."

[HUDDLESTON, B. In the other definitions in s. 4 the word used is "means," but that word is altered to "includes" in the definition of street.]

It is submitted that in addition to the ordinary and primâ facie meaning of the word "street," the artificial meaning given in s. 4 must be attached when not inconsistent with the context. Sect. 150 applies "where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street," is not sewered, &c., to the satisfaction of the urban authority. When once the road was found to be within the district, and not a highway repairable by the inhabitants at large, the justices were bound by the definition in s. 4 to find that it was a street. *Reg.* v. *Dayman* (1) is not an authority against this contention. That was a rule under 11 & 12 Vict. c. 44, s. 5, calling upon the magistrate to hear and adjudicate whether or not a highway was a "new street" within the meaning of 18 & 19 Vict. c. 120, and the Court said that the magistrate had heard and adjudicated, and discharged the rule upon that ground. The legislature seems to have contemplated that country lanes within the district of urban sanitary authorities should become streets for sanitary purposes in some instances: *Coverdale* v. *Charlton* (2) and *Robinson* v. *Barton Local Board.* (3)

(1) 26 L. J. (M.C.) 128. (2) 3 Q. B. D. Judgment of Cockburn, C.J., at pp. 377, 378. (3) 21 Ch. D. 621.

POLLOCK, B. The addendum to the case which the justices have made in answer to the question of the Court shews, I think, that they have acted upon what was said to be the duty of justices in *Reg.* v. *Dayman.* (1) That case laid down clearly that it was the duty of the magistrate to find in fact whether or not the road was a new street. The difficulty in the present case arose because the justices thought themselves bound to find that the road was a street by reason of the definition of "street" in s. 4 of the Public Health Act, 1875. I am of opinion that they were not so bound. If s. 4 had said that street should "mean" or should "be deemed to be" any highway, road, lane, &c., the contention for the respondents might be supported. But the words are "street includes" any highway, &c., and I am of opinion that the legislature intended that the justices should find as a fact whether or not there was a street. I think the appellants are entitled to our judgment.

HUDDLESTON, B. I am of the same opinion. When the case went back to the justices the question was one entirely of fact for them to decide. They have found that the road in question was not a street.

NORTH, J. I am of the same opinion.

Judgment for the appellants. Leave to appeal was refused.

Solicitors for appellants: *Sharpe, Parkers, Pritchard, & Sharpe, for Weatherhead and W. & G. Burr, Bingley.*

Solicitors for respondents: *Emmett, Son, & Stubbs, for Peel, Stamford, & Hines, Bradford.*

(1) 26 L. J. (M.C.) 128.

W. A.

1883
March 7.

FRASER *v.* MASON.

Copyhold — Arbitrary Fine—Omission to demand fixed Sum—Three Years' improved Annual Value.

A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of three years' improved annual value of the tenement to which the admittance relates, and without stating in money the precise amount of the fine.

Affirmed on appeal 11 Q.B.D. 574.

Statement of Claim. In October, 1878, the defendants were admitted to one undivided half-part of a parcel of land called "The Paddock," situate within the manor of Oldbury, Walloxall, Worcester, and were also admitted by a separate admittance to one undivided half-part of a messuage and land also called "The Paddock," and another close called "The Croft," to hold to them their heirs and assigns according to the custom of the manor; and on the same day the defendants, as trustees of a deed of family arrangement, were admitted in like manner to one undivided half-part in each of the said premises. Upon each of the four admittances there became due from the defendants to the plaintiff, as lord of the manor by the custom of the manor, a reasonable fine in respect of such admittance. That the plaintiff accordingly assessed the several fines at three years' improved annual value of the several tenements. That the improved annual value of each of the tenements to which the first and third of the admittances related amounted to 340*l.* 2*s.* 6*d.*, and of the tenements to which the second and fourth related to 363*l.* 15*s.*, and that the defendant, although requested, had not paid the amount of the fines.

The plaintiff claimed a declaration that a fine was due in respect of each admittance amounting to three years' improved annual value of the tenements; payment of the amounts above mentioned, and if necessary an inquiry what was the improved annual value of the tenements respectively, and payment of fines amounting to three years' improved annual value.

Defence, denying that the sums above mentioned were three

years' improved annual value of the premises, and alleging that no other sum was ever demanded by the plaintiff before action.

By judge's order the question raised on the pleadings, whether the lord of a manor, who is by custom of the manor entitled to a reasonable fine on each admittance to a copyhold hereditament, is on the admittance of two lives to a single copyhold hereditament entitled to assess the fine at three years' improved annual value, and, without fixing or assessing any amount or sum certain as the amount of the improved annual value of such fine, to bring an action for the purpose of ascertaining and obtaining payment of it, was stated for the opinion of the Court.

Anstie, Q.C. (*Rose*, with him), for the plaintiff. To enable an arbitrary fine to be recovered it must be reasonable, and where a definite sum is fixed by the lord he can recover that sum and no other. To avoid the difficulty of stating the precise amount, it is suggested by Lord Mansfield in *Grant* v. *Astle* (1), where the question was whether the lord having assessed the fine at too high a figure could recover a smaller sum, that the lord might assess a fine for two years' value, and make that solely the ground of his declaration. The plaintiff has acted in accordance with this suggestion.

[He was stopped.]

Jelf, Q.C. (*J. S. Will*, with him), for the defendant. In the case of an arbitrary or reasonable fine, the lord can only recover if he has fixed the exact amount. It is not enough merely to lay down the principle of valuation. The reason for requiring the precise amount to be stated is that the tenant may know at once whether it is reasonable or not. The requirements are a reasonable fine, assessment, and demand: *Trotter* v. *Blake* (2); *Lord Verulam* v. *Howard*. (3) In *Hayward* v. *Cruden* (4), it is distinctly laid down that the lord cannot recover a fine as upon a quantum meruit.

[DAY, J. Why cannot the tenant pay into court what he thinks reasonable?]

The tenant is not bound to take any step to relieve the lord from his liability.

(1) 2 Doug. 722, at p. 732.
(2) 2 Mod. 229.
(3) 7 Bing. 327.
(4) 6 H. & N. 308.

1883

FRASER v. MASON.

CAVE, J. There is really no defence to this action. The lord of the manor, following the suggestion of Lord Mansfield in *Grant* v. *Astle* (1), has assessed the fine on the admittance to these tenements at three years' improved annual value. But it is objected that he ought to discharge the functions of a surveyor, and fix in each case the exact amount of the fine in pounds, shillings, and pence. The suggestion of Lord Mansfield is, of course, entitled to very great respect, and we have been referred to no decision which is opposed to it. It is not disputed that the principle which the lord has adopted is a reasonable one. All that the defendant has to do is to appoint his valuers to ascertain what is the amount on the principle furnished to him, and to pay the money into court. Why should the lord have to fix the exact sum at the risk of having a judgment against him if he asks too much? The defendant is, if anything, in a better position than the lord for ascertaining the real value.

DAY, J., concurred.

Judgment for the plaintiff.

Solicitor for plaintiff: *Needham, for E. & A. Caddick.*
Solicitors for defendant: *Taylor, Mason, & Taylor.*

A. P. S.

March 8.

RICHARDS *v.* MAY.

Building Contract—Extras—Certificate of Surveyor conclusive.

Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—

Held, that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive.

SPECIAL CASE stated by an official referee in an action which had been referred to him for trial. The facts, so far as material, were as follows:—

The action was for the price of work done for the defendant

(1) 2 Doug. 722, at p. 731.

1883

RICHARDS v. MAY.

under a contract for the erection of two villas with stables. By the terms of the contract the plaintiff, the contractor, was, for a certain sum, to construct and do all and every the works mentioned, described, and set forth in certain drawings and specifications in accordance with conditions attached to the contract and incorporated therewith.

The 4th clause of the contract provided that all extras or additions, payment for which the contractor should become entitled to under the said conditions, and all deductions, which the proprietor should become entitled to, should be respectively paid or allowed for at the price which should be fixed by Mr. S. J. Lethbridge the surveyor appointed by the defendant.

The 7th condition provided that alterations in, or additions to, were not to vitiate the contract, and if no price were agreed upon, the value thereof should be added to or deducted from the contract at a fair measure and value by the surveyor.

By the 15th condition the contractor was to be paid on the certificate of the surveyor at the surveyor's discretion during the progress of the works, in payments on account at the rate of 85 per cent. on the value of the works executed, and the balance of such contract was to be paid at the completion of the works to the surveyor's satisfaction.

The surveyor appointed had, in his final certificate, certified for a sum including an amount specified to be in respect of certain extras and additions. The defendant contended that certain of the matters, in respect of which the surveyor had so certified as extras and additions to the contract, were not extras and additions to the contract.

The question asked by the learned referee was whether such certificate was binding and conclusive in respect of the amount due from defendant for extras and additions.

Dawson Yelverton, for the plaintiff. The 4th clause of the contract in effect gives power to the surveyor to determine what is due to the contractor for extras.

Sidney Woolf, for the defendant. There is no general clause in this contract constituting the surveyor an arbitrator with regard to disputes arising under the contract. The 4th clause

1883

RICHARDS v. MAY.

only enables the surveyor to fix the price of extras, but it does not make his decision as to what are extras conclusive or binding. The defendant proposes to shew that matters in respect of which the surveyor has certified are not extras. There is nothing in the contract or conditions that prevents him from so doing, or makes the surveyor an arbitrator in this respect. [He cited *Goodyear* v. *Mayor, &c., of Weymouth* (1); *Westwood* v. *Secretary for India.* (2)]

CAVE, J. I am of opinion that the plaintiff is entitled to our judgment. The question is whether the certificate of the surveyor is conclusive, not only as to the prices of the matters in dispute, if extras, but also as to the question whether these matters are extras. The material clause of the contract is the 4th, by which power is given to the surveyor to fix the price of extras. That clause standing alone, I think, impliedly gives him power to determine what are extras. There is not in the present case any other clause which provides for the mode of determining what are extras. The only mode, if the surveyor is not to determine this question, would be that it should be determined by the verdict of a jury. That seems to me so cumbrous a method that I cannot think the parties intended this. What they have said is that the surveyor shall fix the price, and I think that, by necessary implication, involves that he should determine what are extras, and if so his certificate is conclusive.

DAY, J., concurred.

Judgment for the plaintiff.

Solicitor for plaintiff: *W. A. Smith.*
Solicitors for defendant: *Hogan & Hughes.*

(1) 35 L. J. (C.P.) 12. (2) 7 L. T. (N.S.) 736.

E. L.

ADAMS *v.* CLUTTERBUCK. 1883 *Feb.* 21.

Conflict of Laws—Incorporeal Hereditament—Lease made in England by Englishmen of Sporting Right over Land in Scotland—Absence of Seal—Action in England—Enjoyment of Right.

By Scotch law an instrument under seal is not necessary for the conveyance of a sporting right, and therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the lex fori.

Even if such lease were invalid for want of a seal, the lessee, after having had enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease.

STATEMENT OF CLAIM.

Under a lease of the 13th of January, 1880, for three years, the defendant became tenant to the plaintiff at an annual rent of a furnished lodge, and of the exclusive right of shooting and sporting over certain moorlands in Scotland, and agreed to leave a good breeding stock of grouse upon the ground at the termination of the lease. The defendant did not at the termination of the lease leave a good breeding stock of grouse on the ground. The plaintiff claimed 1200*l.* damages.

Defence (inter alia), denial of any lease. If the defendant became tenant, he became tenant under an instrument in writing but not under seal, and by such instrument the right of shooting and sporting was not granted as appurtenant to the furnished lodge.

Reply, that the right of shooting or sporting was over land in Scotland, and that the law of Scotland, and not the law of England, governed and determined the nature of the right and the mode of conveying it; that by the law of Scotland an instrument under seal is not necessary for the conveyance thereof, and the instrument of the 13th of January, 1880, having been followed by possession thereunder, was in all respects binding and effectual.

Rejoinder, that this instrument was made and signed in

1883

ADAMS v. CLUTTERBUCK.

England and within the jurisdiction of the Court, and by and between the plaintiff and defendant, who were Englishmen, and then and now domiciled in England and within the jurisdiction of the Court, and therefore the law of Scotland did not govern or determine the nature of the right or the mode of conveying it, nor did it nor could it in any way apply thereto.

Demurrer, on the ground that the Scotch and not the English law governs and determines the nature of the right of shooting over land in Scotland, and the mode of conveying such right.

R. T. Reid, Q.C. (*J. Shortt*, with him). The law of Scotland, where the subject-matter of the lease was, applies. In Story on the Conflict of Laws, 7th ed. s. 424, the author writes as to the "operation of foreign law in regard to real or immovable property. And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them," p. 533; and in s. 436, Story writes: "Erskine in his Institutes, states this to be the law of Scotland: 'In the conveyance,' says he, 'of an immovable subject, or of any right affecting heritage, the grantor must follow the solemnities established by the law, not of the country where he signs the deed, but of the State in which the heritage lies, and from which it is impossible to remove it.'" So Wharton in the Conflict of Laws, ss. 274, 295, 372.

Secondly, even assuming that the law of England governed the lease, and it were void for want of a seal, the defendant, having enjoyed the property, is liable: Woodfall's Law of Landlord and Tenant, 11th ed. p. 117.

Jelf, Q.C., for the defendant. The solemnities of a conveyance may, no doubt, suffice, if according to the law of the place where the property is situate. But the question is whether a contract can be enforced here without being subject to the requirements of the law of this country. This document cannot be enforced here. The plaintiff must put it in evidence, and when looked at by the Court it will appear to be an instrument which is void by English law so far as it relates to sporting rights. An action will not lie in our Courts to enforce an oral agreement made in France

(and valid there), which, if made here, could not, by reason of the Statute of Frauds, have been sued upon: *Leroux* v. *Brown*. (1) There is here a narrow distinction between the lex loci and the lex fori.

[CAVE, J. It is said that the defendant has had the right of sporting vested in him by the law of Scotland and so has had the consideration de facto and de jure.]

The plaintiff sues on a definite executory contract, and not for use and occupation, and the claim cannot be treated as one for compensation for use actually enjoyed. The whole demise was void: *Doe ex dem. Griffiths* v. *Lloyd* (2); *Bird* v. *Higginson*. (3)

[CAVE, J., referred to *Doe dem. Rigge* v. *Bell* (4).]

There the agreement was void by the Statute of Frauds. The point raised on the record is whether the lex loci or lex fori shall prevail, and the plaintiffs cannot now suggest that the English law, if applied differently, will avoid his difficulty.

Reid, Q.C., replied. The English law only refuses to enforce contracts repugnant to it. This is not so. It must no doubt be construed according to English law, but the question is, what is the English law as to contracts made relating to land in a foreign country? If the solemnities required in the foreign country are complied with, as in the present case, the contract can be enforced.

It is said that though good by the lex rei sitæ it must also be good according to the lex fori. That is not so. There is no such thing as an incorporeal hereditament in Scotland. *Leroux* v. *Brown* (1) was a case between a Frenchman and an Englishman, and under the Statute of Frauds. The Court held as a matter of procedure that the action could not be brought in England.

The whole record must be looked at. It shews that the plaintiff has enjoyed the sporting right on admitted terms which he has failed to perform.

CAVE, J. I am of opinion that the plaintiff is entitled to judgment. The main question raised is whether the provision of the law of England that a right of shooting can only be conveyed by an instrument under seal is a part of the lex loci or lex fori?

(1) 12 C. B. 801.
(2) 3 Esp. 78.
(3) 2 Ad. & E. 696.
(4) 5 T. R. 471.

1883

ADAMS v. CLUTTERBUCK.

The provision regulates and was intended to regulate the transfer of interests in land, and unless there is compliance with the provision the grantee takes no legal estate by the grant, quite irrespective of whether he is seeking to enforce the claim in a court of justice or not. I cannot doubt that the provision is therefore a part of the lex loci and not of the lex fori. Suppose the laws in this case were reversed, and that according to the law of Scotland a seal was required, but according to the law of England no seal was required. The consequence, according to Mr. Jelf's contention, would be that a person who had conveyed a right of shooting in a mode which gave no legal estate to the grantee in Scotland, could nevertheless sue in England on the contract as if he really had conveyed his right to the other party. This shews that the contention cannot be correct, and that the provision is part of the lex loci and not of the lex fori. There is no proposition of law to be found, so far as I know, in any book to the contrary. *Leroux* v. *Brown* (1) turns on the provisions of the Statute of Frauds, the very language of which indicates that it is part of the lex fori and not of the lex loci.

I am also of opinion that the statement of defence is bad. I can find no case in which a man who had entered into a contract to do something on property on the expiration of a term of years has been held free from liability because, although he had actually enjoyed the property, he had not acquired a vested right in the term by the instrument under which he enjoyed it. The language in *Doe dem. Rigge* v. *Bell* (2) and in Woodfall's Law of Landlord and Tenant, 11th ed. p. 117, undoubtedly points in a different direction. (3) Of course if the lease or the term actually contracted for was never enjoyed and there had been a failure of consideration for the promise, it would be otherwise. But if the lease has actually been enjoyed, it seems to me that justice requires that the lessee should perform that which he agreed to perform. In this case it is obvious from the language of the pleadings that the defendant has had the enjoyment of the shooting for three years. The action is brought because he has not, at the expiration of the term, complied with the agree-

(1) 12 C. B. 801. (2) 5 T. R. 471.

(3) And see *Martin* v. *Smith*, Law Rep. 9 Ex. 50.

ment to leave a sufficient head of game on the estate, and I think that to hold him free from that obligation because, although he actually enjoyed the shooting, he did so not under a legal, but under an equitable title only, would be wrong.

Demurrer overruled with costs.

Solicitor for plaintiff: *Spencer Whitehead.*
Solicitor for defendant: *Lancelot Drew.*

J. R.

LOWE AND ANOTHER *v.* THE BISHOP OF CHESTER.

March 1.

Church—Donative—Transfer of Advowson by Patron during Vacancy—Trust to appoint Nominee—Nomination of Self—Right to Benefice.

The patron of a donative benefice, being a qualified clergyman and officiating curate of the church, by deed poll, executed during a vacancy of the benefice, granted the advowson to a trustee in trust to present whomsoever the patron should nominate; the patron then by word of mouth nominated himself, and the trustee by deed poll granted the office of rector to him:—

Held, that the transaction was valid, and that he thereupon became rector and entitled to the profits of the benefice.

SPECIAL CASE.

The rectory of Plemstall, in the diocese of Chester, was and is an ancient donative benefice, except in so far as it and others may have been affected by an Order in Council of the 27th of August, 1846, ratifying a scheme under 6 & 7 Wm. 4, c. 77, for abolishing peculiar and exempt jurisdictions in the diocese. [The order was set out.]

By indenture dated 1st August, 1873, the advowson of the benefice was, in consideration of 2500*l.*, granted and conveyed to the plaintiff, the Rev. Thomas Lowe, in fee simple. The Rev. Isaac Temple was at that time incumbent. He died on the 5th of December, 1880. The said plaintiff had had a licence from the defendant, the Lord Bishop of the Diocese, to officiate as assistant curate of Plemstall for some years before the death of the Rev. Isaac Temple, and was officiating as such curate before and at the death of the Rev. Isaac Temple. Afterwards, the said plaintiff continued to officiate in the parish, and parish church. The licence

1883

LOWE v. BISHOP OF CHESTER.

was revoked by the bishop on the 1st of January, 1882. On the 9th of December, 1880, the defendant issued a sequestration reciting that the parish church was at this time vacant by the death of the last incumbent and authorizing the sequestrators to collect, inter alia, the tithes during the vacancy.

The sequestrators received the tithes due on the 1st of January, 1881, and part of the tithes due on 1st July, 1881, and 1st January, 1882.

The said plaintiff, the Rev. Thomas Lowe, on 30th of May, 1881, executed a deed poll by which the advowson and right of donative in and to the benefice was granted to the plaintiff James Lowe, upon trust to donate such person as the plaintiff the Rev. Thomas Lowe should nominate for that purpose. The plaintiff, James Lowe, on 31st of May, 1881, executed a deed poll, in which he gave and granted the office of rector or incumbent of the benefice, to the Rev. Thomas Lowe, who had nominated himself for the purpose by word of mouth.

Except by the execution of this deed poll, the plaintiff, James Lowe, did no act or thing to put the plaintiff, the Rev. Thomas Lowe, into possession of the benefice. The bishop declined to recognise the plaintiff, the Rev. Thomas Lowe, as incumbent, and the sequestrators thereafter collected part of the tithe rentcharge. By agreement between the parties the sums received by the sequestrators were paid into a bank to abide the decision in the action. Of that amount 162*l.* 0*s.* 11*d.*, represented the income of the rectory from the death of Mr. Temple to the date of the execution of the deed of donation, viz. 31st of May, 1881, and the remainder, viz., 198*l.* 4*s.* 9*d.*, the income of the rectory since that time to the date of the writ.

The questions were: Was either and which of the plaintiffs entitled to recover both or either, and which, of the sums in the action?

Jeune, for the plaintiffs. "A donative is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction by any mandate from the bishop or other; but the donee may, by

the patron or by any other authorized by the patron, be put into possession. . . . ." Donatives "are to be distinguished from those called sinecures and exempt jurisdictions . . . . and exempt jurisdictions are not so called, because they are under no ordinary; but because they are not under the ordinary of the diocese, but have one of their own, and are therefore called peculiars:" 2 Burns' Eccles. Law. (9th ed.) p. 222.

The Order in Council was issued under an Act, 6 & 7 Wm. 4, c. 77, intended to destroy exempt jurisdictions but not donatives. It does not apply to them. The plaintiff is legally the incumbent of this donative benefice. That he is patron, and fit for the incumbency, is undisputed. First. No document was needed to make him rector. If the patron of a donative is himself a qualified clergyman he has only to take possession on a vacancy to become incumbent. Here he is in possession. Secondly. If any form was necessary, the proper one has been adopted. At law a man could not grant to himself. But here no grant was needed. If a benefice is presentative the right to present to the next turn cannot be transferred at law. It is a chose in action and does not pass to the heir: 2 Stephen's Laws relating to the Clergy, p. 1267; *Stephens* v. *Wall* (1); but a donative goes to the heir; *Repington* v. *Governors of Tamworth School* (2), which case is recognised as authority by Littledale, J., in *Rennell* v. *Bishop of Lincoln.* (3) There can therefore be no technical objection to a grant of the next turn in the case of a donative. In *Fairchild* v. *Gaire* (4) there was a transfer after a vacancy and presentation on such transfer, and no objection taken. If the transfer had been invalid the plaintiff could have had no title to the tithes claimed. There is also another reason why the beneficial interest in a presentative benefice cannot be sold during a vacancy, viz., because such sale has been held to be simoniacal. But that reason does not apply to this case. Simony is a corrupt agreement to present. It cannot be simoniacal to transfer the bare interest of a trustee. By such transfer the presentation goes to the trustee, the nomination remains in the transferor. The nomination is the substance of the advowson and the presentation no

(1) Dyer, 282.
(2) 2 Wils. 150.
(3) 7 B. & C. 113, at p. 151.
(4) Yelv. 60.

1883

LOWE v. BISHOP OF CHESTER.

more than a ministerial interest: 1 Burns' Eccl. Law, p. 137. To sell the right of nomination may indeed be simoniacal. In *Walsh* v. *Bishop of Lincoln* (1) it was argued that a man could not grant to himself. But it was not so held, and Lord Coleridge, C.J., put the very case of a conveyance in trust to present by one who presents himself.

Lastly. The plaintiff Thomas Lowe, as patron of the living, whether incumbent or not, is entitled to the profits, and the sequestrators take them wrongly.

Charles, Q.C. (*W. G. F. Phillimore*, with him), for the defendant. A donative is within the Sequestration Acts. The profits of a donative do not belong to the patron. In *Walsh* v. *Bishop of Lincoln* (1) the Court merely held that the purchaser of a life-estate in an advowson while the living was full, was not a mere purchaser of the next presentation. If this was a presentative benefice the conveyance during a vacancy would be void beyond question. So an attempt is made to distinguish between a presentative and a donative in this respect.

First. The patron of a donative cannot present himself. There is no one else to judge of his fitness for the cure of souls, and the interests of the parishioners are thus involved. To avoid this difficulty the plaintiff clergyman, after a vacancy, conveyed the advowson to another person. It is said that, in case of a presentative the right to present is a chose in action not assignable, and goes to the executors, whereas in the case of a donative the right goes to the heir. But this reason is too narrow. In *Bishop of Lincoln* v. *Wolforstan* (2) Lord Mansfield and Mr. Justice Wilmot both said "that the true reason why a grant of a fallen presentation, or of an advowson, after avoidance, is not good, quoad the fallen vacancy, is the public utility and the better to guard against simony, not for the fictitious reason of its having then become a chose in action."

Fairchild v. *Gaire* (3) does not apply. No question arose there whether the gift was good. The only point was whether the resignation of the defendant was good, and it was held to be so.

(1) Law Rep. 10 C. P. 518. (2) 3 Burr. 1504.
(3) Cro. Jac. 65.

From the report in Cro. Jac. it appears that the resignation was to the new patron.

In *Walsh* v. *Bishop of Lincoln* (1) Lord Coleridge, C.J., referring to the doctrine that the same person cannot be both donor and donee, and to *Hecker's Case* (2) says, "It is on this ground, a technical though sufficient one, and one entirely beside the canonical restriction, that the Courts of law have admitted the rule of which *Hecker's Case* (2) is but example."

The only mode of overcoming the objection that the patron could not present himself, was by a transfer of the advowson while the living was full. It could not be made during a vacancy. No instance can be found in which such conveyance as that in this case has been upheld.

Secondly, this assignment on trust that the assignee should grant the rectory to the nominee of the assignor was in effect an assignment of the right of next presentation, and that assignment being during a vacancy is void: *Alston* v. *Atlay*. (3) Whether it was for money or gratuitous, see *Mirehouse* v. *Rennell*. (4)

CAVE, J. The plaintiffs are entitled to judgment. The difficulty raised by Mr. Charles is highly technical, and depends on the old metaphysical doctrine that a man cannot be both donor and donee, that A. cannot convey to himself, and that should he desire to do so he must do it by conveying to B. for him. That difficulty was partially overcome by the Statute of Uses. By still later legislation the difficulty has been wholly overcome without any convulsion following from the old law being broken in upon. I am not satisfied that this highly technical reasoning applies to a donative. But assuming that it does, and that the patron of this living could not appoint himself, I am clearly of opinion that he has adopted the right course to get over the difficulty. That course, which was adopted in the old law, was a conveyance to some one as a mere conduit-pipe for the donor himself. Here he conveyed to James Lowe, on trust for such person as he, Thomas Lowe, should nominate, and the plaintiff, Thomas Lowe, has

(1) Law Rep. 10 C. P. 518.
(2) Year Book, 13 Hen. 8, f. 12, pl. 2; 14 Hen. 8, f. 2, pl. 2.
(3) 7 Ad. & E. p. 304.
(4) 8 Bing. 490.

1883

LOWE v. BISHOP OF CHESTER.

nominated himself. Mr. Charles raised another difficulty with respect to that transaction, and said that the deed-poll is void, because after the benefice has become vacant the owner cannot part with the next presentation. It is admitted that the foundation of that doctrine is public utility, and the prevention of the evils of simony. But the object of this grant is not to give the least beneficial right to James Lowe, but solely to use him as a conduit-pipe. The patron is not parting with the next presentation; on the contrary he is overcoming the difficulty of conveying to himself. That is the only object of this transfer, and I am satisfied that it is not void on the ground of being against public utility or the law of simony.

DAY, J. I quite concur, and for the same reasons.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lee, Bolton, & Lee.*
Solicitor for defendant: *S. Dunning.*

J. R.

March 1.

ROOPE *v.* D'AVIGDOR.

Action, Right of—Statement of Claim shewing Felony—Demurrer.

A statement of claim is not demurrable on the ground that it shews the cause of action to be a felony for which the felon has not been prosecuted.

STATEMENT OF CLAIM alleged a co-partnership between the plaintiff and defendant, and that the defendant fraudulently appropriated, stole, and embezzled the money, effects, and property of the co-partnership, whereby the co-partnership was obliged to suspend payment, and the plaintiff suffered loss for which he claimed damages.

Demurrer, on the ground that no action could be brought in respect of the theft and embezzlement until either the thief was prosecuted or circumstances were stated to shew that prosecution was impossible, and that no such circumstances were shewn upon the face of the statement of claim.

T. W. Wheeler, for the defendant. The cause of action appears

in the statement of claim to be a felony; for a partner is now liable to conviction for larceny of the partnership goods. No prosecution of the felon is alleged, nor is it stated that such prosecution is impossible. The action cannot be maintained until after prosecution. If the fact of felony only appears during the trial of an action brought in respect of it, the Court cannot stop the case, and must try the issues on the record: *Wells* v. *Abrahams.* (1) But, as Lush, J., in that case suggests, if the felony appears in the claim it may be demurred to. It is new for a plaintiff to boldly allege a felony unprosecuted as his cause of action. The action is suspended. In recent cases the Courts have stayed actions as frivolous: *Castro* v. *Murray* (2); *Dawkins* v. *Prince Edward of Saxe-Weimar* (3); *Watney* v. *Haslam* (4), an action founded on *Hegarty* v. *Shine.* (5) Perhaps *Ex parte Ball, In re Shepherd* (6), may be cited for the plaintiff, but the Lords Justices only decided in that case that the obligation to prosecute did not extend to a trustee in bankruptcy, and Baggallay, L.J., said, "That notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice." (7) The statement of claim must shew a cause of action in præsenti.

Cohen, Q.C. (*W. English Harrison*, with him), for the plaintiff, was not heard.

CAVE, J. Whatever may be the proper mode of suspending an action or of raising an impediment to it on the ground that it is brought in respect of a felony, and that the felon has not been prosecuted, the proper mode of doing so is not, in my opinion, by demurrer. I do not find any opinion that such a defence should be raised on demurrer expressed by Lush, J., in *Wells* v. *Abrahams.* (1) The observations of the Lords Justices who decided *Ex parte Ball, In re Shepherd* (6), lead me to conclude that the majority of the Court thought there was a cause of action,

(1) Law Rep. 7 Q. B. 554.
(2) Law Rep. 10 Ex. 213.
(3) 1 Q. B. D. 499.
(4) Unreported.
(5) 14 Cox, Cr. C. 124, 145.
(6) 10 Ch. D. 667.
(7) 10 Ch. D. 667, at p. 674.

1883

ROOPE v. D'AVIGDOR.

although there had been no prosecution, and that if there were any mode of staying the action it must be by some application made summarily to the Court, and not by demurrer. The learned counsel has been unable to produce any authority shewing that demurrer has ever been held to be right in such a case. I think this demurrer must be overruled.

DAY, J. I am entirely of the same opinion.

Demurrer overruled.

Solicitors for plaintiff: *Lawrence, Plews, & Baker.*
Solicitors for defendant: *Futvoye, Field, & Baker.*

J. R.

March 8.

DAVIS *v.* BURTON.
BLAIBERG, CLAIMANT.

Bill of Sale—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form given by the Act.*

The Bills of Sale Act, 1878, Amendment Act, 1882, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to the Act annexed.

The Act also provides that personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes, viz., among others: 1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security. 2. If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes. 4. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee produce to him his last receipts for rent, rates, and taxes.

By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto by way of security for the payment of 300*l.* money advanced and 180*l.* for agreed capitalised interest thereon at the rate of sixty per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates, and taxes, in respect of the premises on which the goods assigned might be, when demanded in writing or otherwise; and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or

1883

DAVIS v. BURTON.

become bankrupt. It was also by the said bill of sale agreed that, if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act, 1878, Amendment Act, 1882:—

Held, that the bill of sale was void as not made in accordance with the form given in the schedule.

Affirmed on appeal 11 QBD 337 CA

SPECIAL CASE. The facts being in substance as follows:—

The plaintiff had recovered a judgment against the defendant, and a fi. fa. having issued certain goods had been seized thereunder. The claimant thereupon claimed the goods seized under a bill of sale. The sheriff interpleaded, and it was ordered that a case should be stated.

The provisions of the bill of sale, so far as material, were as follows:—The defendant, therein called the mortgagor, thereby assigned to Blaiberg, therein called the mortgagee, certain goods and chattels enumerated in a schedule thereto "by way of security for the payment of the said sum of 300*l.* (the sum advanced) and of the capitalised interest thereon as hereinafter mentioned, being at the rate of sixty per cent. per annum, and any further moneys that may be advanced and interest thereon, under the provisions hereinafter contained." The mortgagor then agreed and declared that she would duly pay to the mortgagee "the principal sum aforesaid, together with the further sum of 180*l.* for agreed capitalised interest thereon, making together the sum of 480*l.*, as follows: by consecutive quarterly instalments of 45*l.* each, the first of such to become due and payable on the 12th of March, 1883, and the balance, or so much as shall remain unpaid, to become due and payable on the 12th of December, 1883," and it was provided that, in the meantime and until such goods and chattels should be taken possession of by the mortgagee under the powers in that behalf thereinafter contained, they should remain in the possession of the mortgagor.

The mortgagor covenanted, among other things, that she would pay the rent, rates, taxes, and other impositions payable in respect of the premises on which the goods mortgaged might be, immediately when due, and would deliver to the mortgagee the receipts for rent, rates, taxes, and impositions aforesaid when demanded

1883

DAVIS v. BURTON.

"in writing or otherwise." She also covenanted not to make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become bankrupt. It was further declared and agreed that, if the mortgagor should break any of the covenants contained in the bill of sale, all moneys thereby secured should immediately become due and be forthwith paid to the mortgagee, and further, that all the foregoing covenants and agreements were necessary for maintaining the security within the meaning of subs. 1, s. 7, of the Bills of Sale Act, 1878, Amendment Act, 1882: "Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882."

The question for the Court was whether the bill of sale was in accordance with the form given in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882, and if not in accordance therewith whether it was void against the execution creditor.

C. C. Scott, for the execution creditor. The bill of sale is void, because it is not in accordance with the form given in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882, and contravenes the provisions of that Act: see 45 & 46 Vict. c. 43, ss. 7 and 9. The provision as to capitalized interest is illegal, for the form only provides for payment of the principal and interest at a certain rate per annum. Again, this bill of sale entitles the mortgagee to seize upon events other than those provided for by s. 7 of the Act.

Sims (*Herbert Reed*, with him), for the claimant. The form given in the schedule permits the insertion of any terms which the parties may agree to for the maintenance of the security. The 7th section provides that the goods may be seized under the bill of sale if the grantor shall make default in payment of the sum secured at the time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security. Here the covenants inserted were agreed upon as necessary for the main-

tenance of the security, and by the terms of the bill of sale upon default in the performance of any such covenants a certain sum was to become immediately payable for the principal and capitalized interest. Upon default in such payment by the express terms of the Act a seizure might be made. It is contended that there is nothing in the Act to render it incompetent for the parties to make these terms. It is only necessary that there shall be a substantial compliance with the form given in the schedule.

[CAVE, J. The bill of sale indirectly contravenes the provision of s. 7; it in effect makes the goods seizable on events not included in that section, as for instance, the execution by the grantor of an assignment for the benefit of creditors.]

It may be that the result is that the grantee cannot seize on such events, but it does not follow that the bill of sale is void. It must be read as if those clauses were not inserted. The bill of sale expressly provides that the goods may be seized only for the causes specified in s. 7.

CAVE, J. I am of opinion that the execution creditor is entitled to our judgment. This bill of sale sins against the Act in several ways. I agree that substantial accordance with the form given in the schedule would be sufficient; but this instrument is not in substantial accordance with the form.

In the first place it provides for the payment of capitalized interest, which is stated to be at the rate of 60 per cent., but which may come to be enormously more if there is a violation of any of the covenants and a consequent seizure of the goods. That alone is enough to shew that the bill of sale is not in accordance with the form. If it had followed the form, nothing more could have become payable than the principal sum and interest down to the seizure. As it is framed, the effect might be that a week after the execution of the deed the mortgagee could seize for the whole of the so-called capitalized interest. Again, the 7th section of the Act provides that the goods may be seized upon certain specified events and no others. The conditions contained in the instrument in effect provide for seizure in certain cases clearly not included in the Act. For instance, the

1883

DAVIS v. BURTON.

Act says the mortgagee may seize when there has been a demand in writing for the last receipt for rent, and such receipt is not produced without any reasonable excuse for such non-production. Here it is provided that, unless the receipt is produced when demanded in writing *or otherwise*, the whole sum shall become due. The consequence of that is that a verbal notice to produce the receipt might be given, on failure to comply with which the whole sum would become due; and then there might be a seizure nominally under the 7th section for making default in payment, but really for not producing the receipt. It seems to me that this is clearly an attempt to evade the Act; and if such a bill of sale is good, the Act might as well have never been passed. For these reasons I think the bill of sale is void.

DAY, J. I am of the same opinion.

Judgment for the execution creditor.

Solicitors for execution creditor: *Walter & Durham.*
Solicitors for claimant: *Moresby White, Salmond, & Co.*

E. L.

March 8.

FULLER *v.* ALFORD.

Ecclesiastical Law—District—New Parish—Marriages, right to solemnize—Marriage Fees, right to—New Parish Act, 1843 (6 & 7 *Vict. c.* 37), *ss.* 11–15 *—New Parish Act*, 1856 (19 & 20 *Vict. c.* 104), *ss.* 14, 15.

The publication of the banns of marriage and the solemnization of marriage are "ecclesiastical purposes" within the meaning of 19 & 20 Vict. c. 104, s. 14, and, where a district becomes within this section a separate and distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, and of receiving the fees for such marriages, and consequently the incumbent of the mother parish has no right to solemnize such marriages in the church of the mother parish or to receive the fees for the same.

SPECIAL CASE.

1. The plaintiff is the vicar of the ecclesiastical parish of St. Barnabas, in the city and county of Bristol.

2. The defendant was for several years, including the period

of the occurrences hereinafter mentioned, vicar of the parish of St. Paul, in the said city and county.

3. The said parish of St. Paul was constituted by or in pursuance of 27 Geo. 3, c. 49 (Local and Personal), and was separated from the ancient parish of St. James in the said city, and was declared to be a parish for both civil and ecclesiastical purposes. The said statute was amended by 38 Geo. 3, c. 35, which by s. 7 enacted that the two parishes of St. James and St. Paul should be deemed and taken to be two separate and distinct parishes wholly independent of each other in respect to the election of churchwardens, waywardens, and overseers of the poor, and all other parish officers; and also in respect to all parochial rates and assessments of every kind whatever.

4. The site of the church of St. Barnabas was conveyed under the provisions of 1 & 2 Vict. c. 107, and after the erection and consecration of the said last-mentioned church a district was duly assigned by the Ecclesiastical Commissioners for England. The said district was taken out of the parish of St. Paul so constituted as aforesaid.

5. The ancient parish of St. James was situate partly within and partly without the ancient city of Bristol, but by 5 & 6 Wm. 4, c. 76, the municipal boundaries of the said city were extended so as to comprise the whole of the said ancient parish. The said parish of St. Paul was also situate partly within and partly without the ancient city, but under the last-mentioned statute the whole of the said parish of St. Paul was included within the city. The parish or district of St. Barnabas was taken partly from the portion of the parish of St. Paul originally within the city and partly from the portion originally without the city, but afterwards included as aforesaid.

6. By 2 Wm. 4, c. 89, so much of the said parishes of St. James and St. Paul as were then outside the said city were constituted into a district for rating and other civil purposes under the name of "the district of the united out parishes of St. James and St. Paul in the county of Gloucester," and the said district (though now within the city) is still managed by commissioners appointed under the said statute for rating, and such other civil purposes as are not under the control of the corporation of Bristol.

1883

FULLER v. ALFORD.

7. In the year 1843 the church of St. Barnabas was consecrated, and in the year 1851 the same church was, in pursuance of 6 & 7 Wm. 4, c. 85, s. 26, licensed by the Lord Bishop of Gloucester and Bristol for the celebration of marriages, and in the month of May, 1868, an order was made by the Ecclesiastical Commissioners for England in pursuance of the Act 19 & 20 Vict. c. 104, s. 11.

8. The plaintiff was instituted to the vicarage of St. Barnabas in the month of December, 1870, and the defendant was instituted to the vicarage of St. Paul in the year 1871.

9. The defendant, as the vicar of the parish of St. Paul, published banns and solemnized marriages at the church of St. Paul for persons residing within the parish of St. Barnabas, and received and appropriated to his own use the fees payable for such offices.

10. The plaintiff contends that, under the circumstances hereinbefore set forth, and under the provisions of 19 & 20 Vict. c. 104, ss. 14 and 15, persons residing within the parish of St. Barnabas are not entitled to resort to the parish of St. Paul for the publication of banns or the celebration of marriage, and that the vicar for the time being of the parish of St. Paul is not entitled to publish such banns or to celebrate such marriages, and is not entitled to receive or retain the fees for so doing, and that the plaintiff is entitled to recover such fees in this action.

11. The defendant, on the other hand, contends that parties residing in the parish of St. Barnabas are entitled to resort to the church of St. Paul for the purposes aforesaid, and that he was bound to perform the said offices, and that the plaintiff is not entitled to recover the said fees.

12. This action was commenced on the 15th day of June, 1882, by a writ, the indorsement on which was as follows: "The plaintiff's claim is for money received by the defendant to the use of the plaintiff; the following are the particulars:—To amount of marriage fees wrongfully received by the defendant while vicar of St. Paul's, Bristol, which ought to have been received by the plaintiff as vicar of St. Barnabas, 21*l.*"

13. The plaintiff contends that he is entitled to recover the said sum of 21*l.* for fees received by the defendant as aforesaid. The defendant admits that he has received 21*l.* under the circum-

stances aforesaid, but insists that the plaintiff is not entitled to recover the same or to maintain this action.

14. This special case is stated for the opinion of the Court by consent of the parties pursuant to Order XXXIV., rule 1. The questions for the opinion of the Court are:—1. Whether or not the defendant as vicar of the parish of St. Paul, Bristol, was authorized to solemnize the marriage of persons residing within the portion of the said parish which, for ecclesiastical purposes, now forms the parish or district of St. Barnabas; 2. Whether or not the plaintiff can maintain an action for recovery of the sum of 21*l.* admitted to have been received by the defendant as fees for the solemnization of such marriages as aforesaid. (1)

The plaintiff in person. The effect of the legislation on the subject of new parishes contained in 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, is to give the incumbent of such a parish an exclusive right to publish the banns of marriage and to solemnize marriages in respect of persons resident in his parish: see 6 & 7 Vict. c. 37, ss. 11–15. The 14th section of that Act, which reserves the rights of the incumbent of the mother parish till a church is acquired and consecrated for the new parish shews that after such consecration the right of the incumbent of the new parish is intended to become exclusive. The true construction of s. 15 is that the new parish is placed in the same position for all ecclesiastical purposes as if it had been originally a distinct parish. If there could be any doubt as to this under 6 & 7 Vict. c. 34, it is clear that this is the result under the 14th and 15th sections of 19 & 20 Vict. c. 104, with which by s. 20 the former Act is to be construed as one. By the 15th section of that Act the incumbent of the new parish is, saving the rights of the bishop of the diocese, to have sole and exclusive cure of souls, and the exclusive right of performing all ecclesiastical offices

(1) The defendant's counsel stated that he was instructed not to argue the question, whether, assuming the defendant was not authorized to solemnize these marriages, the plaintiff could recover the fees for such marriages, and that therefore with the permission of the Court he should only argue the first question. It was therefore assumed, for the purposes of the case, that if the answer to the first question was in the negative the plaintiff was entitled to recover.

1883

FULLER v. ALFORD.

within the limits of the same for the resident inhabitants thereof, and such new parish is for the like purposes to have and possess all the same rights and privileges and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities.

[He also cited 58 Geo. 3, c. 45, s. 24, and 59 Geo. 3, c. 134, s. 17.]

Jeune, for the defendant. The question really turns on the meaning of the words "ecclesiastical purposes" used in 19 & 20 Vict. c. 104, s. 14, though it may be necessary to refer to the earlier sections of the Act, and to 6 & 7 Vict. c. 37, to see what was intended by a "separate parish for ecclesiastical purposes." The 18th section of 6 & 7 Vict. c. 37, contains an express saving of all rights, ecclesiastical or civil, "except as is herein expressly provided." The inhabitants of the whole of the mother parish originally had a right to be married at the parish church. The question is whether there is any express enactment taking away the right. The provisions of 6 & 7 Vict. c. 37, s. 15, only enable marriages to be performed in the church of the new parish. There is nothing to take away the right to resort to the original parish church. Express words would have been used if it had been intended to do so.

The words of 19 & 20 Vict. c. 104. s. 14, only make the new parish a separate parish for "ecclesiastical purposes." The solemnization of marriage is not solely an ecclesiastical purpose, and therefore is not within these words. Marriage involves a civil contract, and for the purposes of effecting such civil contract the incumbent is an officer of the State bound to perform certain duties which the State requires. The inhabitants of a parish had a civil right to call upon the incumbent to perform those duties. Can it be said that that right is taken away by an Act which merely says that the new parish shall be a separate parish for ecclesiastical purposes?

[He cited *Jones* v. *Gough* (1); *Tuckniss* v. *Alexander*. (2)]

The plaintiff in reply.

CAVE, J. I am of opinion that the plaintiff is entitled to our judgment. I think he would be so entitled by the language

(1) 3 Moo. P. C. (N.S.) 1, 20.

(2) 32 L. J. (Ch.) 794.

of 6 & 7 Vict. c. 37; and, if the language of that statute left any doubt on the matter, I think such doubt is removed by 19 & 20 Vict. c. 104. The 15th section of 6 & 7 Vict. c. 37 provides that, when any church or chapel shall be built, purchased, or acquired in any district constituted as aforesaid, and shall have been approved by the Ecclesiastical Commissioners, and consecrated as the church or chapel of such district as provided by the section, "such district shall from and after the consecration of such church or chapel be and be deemed to be a new parish for ecclesiastical purposes, and such church or chapel shall become and be the church or chapel of such new parish accordingly, and it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages, baptisms, churchings, and burials, and require and receive such fees upon the solemnization of such offices as shall be fixed by the chancellor of the diocese; and the several laws, statutes, and customs in force relating to the publication of banns of matrimony and to the performance of marriages, baptisms, churchings, and burials, and the registering thereof respectively, and to the suing for and recovering of fees, oblations, or offerings in respect thereof shall apply to the church of such new parish and to the perpetual curate thereof for the time being." Thus the district is spoken of as a parish, and the church is to be the church of that parish, and all the existing laws as to banns of marriage and solemnization of marriage are to apply to the church of the parish. The 4 Geo. 4, c. 76, s. 2, provides that all banns of matrimony shall be published in the parish church or in some public chapel in which chapel banns of matrimony may now or may hereafter be lawfully published of or belonging to such parish or chapelry wherein the persons to be married shall dwell. It seems to me that the language of the 15th section of 6 & 7 Vict. c. 37 coupled with that of 4 Geo. 4, c. 76, s. 2, does require that in the case of a new parish under 6 & 7 Vict, c. 37, the banns of marriage shall be published in the church of the new parish and not in that of the old undivided parish. If there could be any doubt as to that, such doubt seems to be removed by 19 & 20 Vict. c. 104, an Act framed for the purpose of making better provision for the

1883

FULLER v. ALFORD.

formation of separate and distinct parishes. That Act provides by s. 11 that the Ecclesiastical Commissioners "may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the bishop of the diocese, make an order under their common seal authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials according to the laws and canons now in force in this realm; and all the fees payable for the performance of such offices shall be payable and be paid to the incumbent of such district." Sect. 12 provides that, in every case in which all or any part of such fees shall have been reserved, or, if such last mentioned order had not been made, would have of right belonged to the incumbent of the original parish, they shall go to such incumbent until the first avoidance, and then to the incumbent of the new parish. Sect. 13 provides for compensation to the incumbent of the original parish; and by s. 14 it is provided, "That, wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm, are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled, for his own benefit, to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first recited Act, and the church or chapel of such district shall be the church of such parish," &c. Mr. Jeune contended that, assuming the new parish was to be a separate and distinct parish for ecclesiastical purposes, the solemnization of marriages was not an ecclesiastical purpose within the meaning of the Act. This point, however, is made clear by the 15th section of 19 & 20 Vict. c. 104, which enacts that the incumbent of the new parish, whether under that Act, or 6 & 7 Vict. c. 37, shall have sole and exclusive cure of souls and the exclusive right of performing all ecclesiastical offices within

the limits of the same for the resident inhabitants therein, who shall, for all ecclesiastical purposes, be parishioners thereof, and of no other parish. Now, it is clear that this is a new parish within that section; and it follows, therefore, that the plaintiff, who is the incumbent, now has the exclusive right of performing all ecclesiastical offices within the limits of the same for the resident inhabitants therein. I cannot doubt that the solemnization of marriage is an ecclesiastical office within the meaning of this section. Recent legislation has no doubt provided for civil marriages without any religious office; but, when a marriage is solemnized in church, I am clear that it is an ecclesiastical office and not a civil one; and so it is one which under this legislation the incumbent of the new parish has an exclusive right to perform in respect of persons residing in his parish. It seems to me that the language of the enactments on the subject is quite clear, and that the plaintiff is entitled to our judgment.

DAY, J. I concur. It seems to me unnecessary to discuss the question how far marriage may involve a civil contract. I am clear that the solemnization of marriage when it takes place in a church is an ecclesiastical purpose within these Acts.

Judgment for the plaintiff.

Solicitors for defendant: *Brittan & Co.*

E. L.

1883
March 19.

BURTON & CO. *v.* ENGLISH & CO.

Ship—General Average—Charterparty—Deck Cargo Jettisoned—"At Merchant's Risk."

It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk:"—

Held, that the words "at merchant's risk," excluded any right on the part of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers and jettisoned.

Special Case stated by an arbitrator, of which the facts were in substance as follows:—

In the month of June, 1881, the plaintiffs chartered from the defendants the steamship *Harvest*, to load a cargo of wood goods at Finnklippan, in Sweden in the Baltic, and proceed therewith to London.

By the charterparty it was stipulated that "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk;" and the usual clause setting forth the perils excepted was as follows: "the act of God, the Queen's enemies, fire, restraint of princes, and all and every other dangers and accidents of the seas, rivers, and steam navigation, and to machinery or boilers of whatever nature or kind during the said voyage always mutually excepted."

The ship duly proceeded to the port of loading, and there shipped a cargo in accordance with the charter under deck, and at the request of the shipowners, made in pursuance of the stipulation in the charterparty, the agents of the plaintiffs loaded a deck load of timber. The master signed a bill of lading for the whole of the goods so loaded, which stated that the goods were shipped in good order and well conditioned, and were to be delivered in the like good order and well conditioned, at the port of London, Surrey Commercial Docks, (the dangers of the sea only excepted) unto the shippers or their assigns, he or they paying freight, and other conditions for the said goods as per charterparty. It was proved by the plaintiffs that there was a custom or usage for ships carrying timber cargoes upon voyages from Finnklippan and other Baltic ports in the neighbourhood to English ports and

ports on the continent of Europe to carry a deck cargo of timber upon such voyages.

During the voyage the vessel stranded and was in danger of being lost, and with a view to lighten her and get her off the ground a part of the deck load of timber was necessarily jettisoned and was lost. The vessel being thus lightened came off the ground and completed her voyage, and delivered the remainder of her cargo safely. It was admitted that the said cargo was necessarily and properly jettisoned and that such jettison was necessary to save the ship and the rest of the cargo.

The plaintiffs contended that the value of so much of the deck load as was so jettisoned under the circumstances aforesaid must be made good in general average or contribution, and that they were entitled to recover from the defendants as owners of the vessel a general average contribution or a contribution in respect of the said loss proportioned to the value of the said vessel and her freight. The defendants contended that no general average or contribution of any sort was payable by them in respect of the said jettison of the said portion of the said deck load.

The question for the opinion of the Court was whether the plaintiffs under the circumstances were entitled to recover a general average contribution or a contribution from the defendants.

March 6, 7. *Cohen, Q.C.* (*J. G. Barnes,* with him), for the plaintiffs. It is admitted that there was a custom to carry deck cargoes, and so there would, in the absence of anything to the contrary, be a right to general average. The term "at merchant's risk," cannot be construed as referring to the liability to general average. Such a term occurring in a charterparty must be taken to relate to the liability of the shipowner as a carrier. Similar terms in bills of lading have been held not to relate to general average contribution: *Schmidt* v. *Royal Mail Steamship Co.* (1); *Crooks* v. *Allan.* (2) The deck load is shipped on the requirement of the shipowner not the charterer.

[He also cited *Macawley* v. *Furness Ry. Co.* (3); *Wright* v. *Marwood.* (4)]

(1) 45 L. J. (Q.B.) 646.
(2) 5 Q. B. D. 38.
(3) Law Rep. 8 Q. B. 57.
(4) 7 Q. B. D. 62.

1883

BURTON v. ENGLISH.

Myburgh, Q.C. (*Webster, Q.C.*, with him), for the defendants. It may be true that the terms of a charterparty or bill of lading, primâ facie, do not relate to the liability to general average but to the liabilities inter se of charterer and shipowner or shipper and shipowner with regard to the carriage of the goods, but, if it is clearly so intended, there is no reason why terms excluding the liability to general average should not be inserted in a charterparty, and the term in question clearly relates to general average. Unless the term, "at merchant's risk," is intended to exclude the liability to a general average contribution, it is difficult to see to what it could apply, for the perils of the sea and other such perils of the voyage are already excepted by the other terms of the charterparty.

[He cited Maude & Pollock, Merchant Shipping, 4th ed. 357, 358; *D'Arc* v. *London and North Western Ry. Co.* (1); *Hall* v. *Great Eastern Ry. Co.* (2)]

Cohen, Q.C., in reply. The words may be construed as exempting the shipowners from loss occasioned by the negligence of the master and crew.

[He cited *Stewart* v. *Pacific Steamship Co.* (3); *Birkley* v. *Presgrave.* (4)]

Cur. adv. vult.

March 19. The judgment of the Court (Cave and Day, JJ.), was delivered by

CAVE, J. This is an action by the shipper against the shipowner to recover a general average contribution or a contribution in the nature of general average for the jettison of a deck cargo of timber; and it is admitted that by reason of a custom to carry deck cargoes of timber on similar voyages the shipowner is liable, unless he is protected by the terms of the charterparty. That instrument provides that the ship shall load a full and complete cargo of deals at Finnklippan, and deliver them at the Surrey Commercial Docks, the act of God, the Queen's enemies, fire, restraints of rulers and princes, and all and every other dangers and accidents of the seas, rivers, and steam navigation, and to

(1) Law Rep. 9 C. P. 325.
(2) Law Rep. 10 Q. B. 437.
(3) Law Rep. 8 Q. B. 88, 362.
(4) 1 East, 220.

machinery or boilers of whatever nature or kind during the said voyage always mutually excepted. The important stipulation is as follows: "The steamer to be provided with a deck load if required at full freight but at merchant's risk." For the plaintiffs it was contended that the words, "at merchant's risk," have reference solely to the liability of the shipowner as carrier, and do not apply to a claim for general average contribution, which is not a risk to which the shipowner is exposed as carrier, but one to which he is exposed as owner of the ship in common with the owners of the cargo; and in support of this contention *Schmidt* v. *Royal Mail Steamship Co.* (1) and *Crooks* v. *Allan* (2) were cited. In the former of these cases it was held that an exception in a bill of lading of "fire on board and the consequences thereof," did not relieve the shipowner from liability to a general average contribution in respect of damage done to the cargo by pumping in water to extinguish a fire. In the latter case it was held that a condition in a bill of lading, "the shipowner or railway company are not to be liable for any damage done to any goods which is capable of being covered by insurance," did not exempt the shipowner from liability to contribute to a general average loss caused by the ship being scuttled on the occasion of a fire breaking out in the hold. In the former of these cases the exception of fire on board was inserted among other exceptions relieving the shipowner from liability as carrier; and in the latter case the carriage on board the ship and the carriage by railway were linked together, which went to shew that the exception was to apply to things for which a railway company would be liable in respect of carriage on land, which could not include general average contribution. Mr. Justice Lush, however, who took part in the decision of both those cases, laid down the principle that the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities for general average, and that, unless the contrary appears, the words must be construed with reference to the contract to carry.

It was contended for the plaintiffs that this principle must apply in the present case, and that, as the words "at merchant's

(1) 45 L. J. (Q.B.) 646. (2) 5 Q. B. D 38.

1883

BURTON v. ENGLISH.

risk" are capable of being construed to refer to the negligence of the master and crew, they must be taken to have that meaning. We do not think that Mr. Justice Lush meant to assert that the language of a bill of lading cannot be construed to apply to general average contribution if that is its more natural meaning. Undoubtedly the ordinary use of a bill of lading is to regulate the respective rights and liabilities of the shipowner and the shipper, or his assigns; but there seems no reason why, if the shipowner desires to make any stipulation with regard to his liability or that of the other owners of cargo to general average contribution, he should not introduce it into a bill of lading. Even where the ship is put up as a general ship, and there is a custom to carry deck loads, there is no reason why a shipowner should not, with a view to getting a higher rate of freight from the owners of cargo below deck, stipulate with the owner of a deck cargo that he should make no claim for a general average contribution in respect of the jettison of the deck load; and such a stipulation, if made, would not unnaturally find its place in the bill of lading.

What then is the natural meaning in this case of the words "at merchant's risk" in the charterparty? Mr. Cohen had some difficulty (looking at the exceptions which applied to the cargo below deck) in pointing out what were the additional matters intended to be covered by the words "at merchant's risk"; but ultimately he contended that it meant risk of loss by the negligence of the master and crew. This, however, would lead to the anomaly that the shipowner would be liable to general average contribution, where, as here, the deck cargo was necessarily and properly jettisoned, but would be free from liability if it was unnecessarily and improperly jettisoned, which seems absurd.

By our law, agreeing in this respect with the law of most foreign countries, deck cargo jettisoned is not entitled to general average contribution; and the reason usually assigned is that it is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it when cargo under the hatches would not be. We have, however, introduced an exception to this general rule where, as here, there is a custom in the trade to carry a deck cargo, although in the absence of such a custom, there is no such exception solely

by reason that the cargo has been shipped on deck by agreement with the shipper: *Wright* v. *Marwood*. (1) If in interpreting the words "at merchant's risk" we are driven to choose, as Mr. Cohen seems to admit we are, between the risk of jettison and the risk of all kinds of negligence of the master and crew, we are of opinion that the former is the more natural meaning; and, although the plaintiffs are not bound by the practice of average adjusters, yet in a matter of some doubt like this we are fortified in our opinion by finding it to be in accordance with that practice. (2)

If the plaintiffs are not entitled to recover a general average contribution, we think it follows, from *Wright* v. *Marwood* (1), that they are not entitled to recover a contribution of any other kind.

There will therefore be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*

Solicitor for defendants: *H. C. Coote, for H. A. Adamson.*

(1) 7 Q. B. D. 62.

(2) It was stated in the case that evidence was given before the arbitrator shewing that the practice of average adjusters, where deck loads were carried under charterparties and bills of lading providing that such deck loads should be carried at merchant's risk, was to exclude all claims made by owners of such deck loads for general average contribution in respect of jettison of such deck loads. The plaintiffs objected to the admissibility of such evidence, and having regard to the grounds of the decision it has not been thought necessary to set out the paragraphs of the case relating to such evidence: see *Atwood* v. *Sellar*, 4 Q. B. D. 342.

E. L.

1883

March 21.

JOHNSTON & CO. *v.* HOGG AND OTHERS.

Ship—Marine Insurance—Policy, Construction of—"Capture and Seizure"—Intention to keep the Ship, whether necessary to constitute "Seizure."

In an action on a policy of insurance upon a ship, in which the subject-matter was warranted "free from capture and seizure, and the consequences of any attempt thereat," it was proved that during the continuance of the risk some natives took forcible possession of the ship in the Brass River, plundered the cargo, and damaged her so that she became a constructive total loss, and that their intention in so taking possession was only to plunder the cargo, and not to keep the ship:—

Held, that the acts of the natives constituted a "seizure" within the meaning of the warranty, and therefore that the underwriters were not liable.

FURTHER CONSIDERATION.

The facts and arguments are sufficiently stated in the judgment.

Butt, Q.C., and *James Fox*, for the plaintiffs.

Gully, Q.C., and *J. G. Barnes*, for the defendants.

The following authorities were cited in addition to those mentioned in the judgment: *Kleinwort* v. *Shepard* (1), *Cory* v. *Burr* (2); *Naylor* v. *Palmer* (3); *Powell* v. *Hyde*. (4)

Cur. adv. vult.

March 21. CAVE, J. The plaintiffs in this case were the owners of a vessel called the *Cypriot;* and they sued the defendants, underwriters at Lloyd's, on a policy of insurance effected on that vessel, alleging that she had been lost by perils insured against. The plaintiffs had in the policy warranted the vessel free from capture and seizure, and the consequences of any attempt thereat. The defence was that the loss was a loss by seizure within the meaning of that warranty. It was admitted by the parties that the *Cypriot* during the continuance of the risk became a constructive total loss, by reason of the proceedings of and damage done by the natives as described in the examination

(1) 28 L. J. (Q.B.) 147; 1 E. & E. 447.

(2) 8 Q. B. D. 313; 9 Q. B. D. 463.

(3) 8 Ex. 739; 10 Ex. 382.

(4) 5 E. & B. 607; 25 L. J. (Q.B.) 65.

of the master; that due notice of abandonment was given, and that the only issue to be tried was whether the loss was a loss by any of the perils from which the vessel was warranted free.

From the examination of the master it appeared that on the 7th of October, 1879, the *Cypriot* got ashore while going down the Brass River. On the following day the natives took forcible possession of the ship; drove away the master and crew, and plundered the vessel in the manner there described. The consequence was, as stated in the admissions, that the ship became a constructive total loss. The jury found that the natives seized the vessel for the purpose of plundering the cargo, and not for the purpose of keeping her. It was contended for the plaintiffs that to constitute the seizure of a vessel there must be a taking possession with intent to keep it as one's own, and not merely for purposes of plunder; and in support of this contention certain passages from well-known text writers were cited.

In Phillips on Insurance, vol i., s. 1108, it is said, speaking of loss by capture, that "by capture is meant the taking possession of property with the purpose of appropriating it to the captor's own use, by which it is distinguished from a mere detention with the design of ultimately liberating the property, as in the case of an embargo." For this proposition the case of *Black* v. *Marine Insurance Co.* (1), is cited. The author also says, "a seizure is equivalent to a capture, as it is made with the intention of depriving the owner of his property in the subject." But a little further on, s. 1110, the author remarks, "The word 'capture' is of itself broad enough to comprehend any forcible seizure, arrest, or detention which may be lawfully insured against." Moreover in *Black* v. *Marine Insurance Co.* (1), the Court said, "seizure may in general be applicable to a taking or detention for the violation of some municipal regulation." In Marshall on Insurance, p. 394, it is said, "capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods which are on board a neutral ship. The former is a capture of the ship in the

(1) 11 John. (N.Y.) 287.

1883

JOHNSTON v. HOGG.

proper sense of the word; the latter is only an arrest and detention without any design to deprive the owner of it."

In Parsons on Insurance, vol. i. p. 584, it is stated that "capture or its equivalent 'seizure' means a taking with intent to keep; 'arrest' or 'detention,' a taking with intent to return the thing taken, as where a ship is arrested by an embargo, or stopped for search, or detained in a port by an actual blockade thereof, or perhaps by being lawfully restrained from entering her port of destination by a blockading force." At another place, vol. i. p. 576, the author says, "If a seizure (which becomes a capture if it be intended to take from the owners the property seized"), &c., which is hardly consistent with the previous definition of seizure.

Several cases were cited which had but a very remote bearing on the point in dispute. The only one it is necessary to mention is that of *Rodoconachi* v. *Elliott* (1), in which case Brett, L.J., then Brett, J., in the course of his judgment says (2): "Capture means the hostile seizure of goods with intent to deprive the owner of them," upon which it is to be observed that in the opinion of that learned judge seizure plus the intent to deprive the owner of the goods is equivalent to capture, from which it follows that the intent to deprive the owner of the goods is not implied in the word "seizure." The ordinary and natural meaning of "seizure" is a forcible taking possession. This was admitted by Mr. Butt, but he contended that the word "seizure" had acquired a peculiar construction in insurance law, and was in fact a technical term involving an intent by the person seizing to keep the vessel as his own. In support of this proposition he relied on the passages above cited, and submitted that in this case what the natives had done was an arrest and not a seizure.

In my opinion the word "seizure" must be taken in its ordinary and natural meaning, and is not a term of art. The passages I have cited from Phillips certainly do not prove that the word has any technical meaning, and the case of *Black* v. *Marine Insurance Co.* (3), which that author cites in support of his view as to the meaning of capture, shews, if anything, that seizure is a general term capable of a very wide meaning.

(1) Law Rep. 8 C. P. 649. (2) Law Rep. 8 C. P. 670.
(3) 11 John. (N.Y.) 287.

Marshall seems to recognise two meanings of the word "capture," but certainly does not assert that the more restricted meaning is that in which alone the word is understood in insurance law.

The passages from Parsons are not more definite, and that from the judgment of Brett, L.J., is rather in favour of the defendants.

The seeming confusion in some of these passages arises from the desire of the authors in question to give a distinct and different meaning to such words as "capture," "seizure," "arrest," "detention," "restraint," and the impossibility of accomplishing the task is shewn by their attempts to distinguish between "arrest," "restraint," and "detention." I have no doubt that the word "seizure," like many other words, is sometimes used with more general and sometimes with more restricted meaning, and whether it is used in a particular case with the one meaning or the other depends not on any general rule but on the context and the circumstances of the case.

This brings us to the consideration of the policy sued on, and after reading it carefully I cannot find any indication that the word "seizure" is used in any but its ordinary and general signification. Indeed, the words "free from capture and seizure and the consequences of any attempt thereat" point to the more general meaning of the word "seizure," since in the case of an unsuccessful attempt at seizure it must obviously be difficult to say what the intention was of those who made the attempt. In this particular case, if the natives had been beaten off by the master and crew, it would have been far from easy to determine what their intention was with regard to the vessel, although it might have been easy to determine what their intention was with regard to the cargo.

As to the contention that there was an arrest, the action of the natives cannot, to my mind, be correctly so described, although if their acts amounted to a seizure, it is immaterial whether it was or was not an arrest unless those terms are mutually exclusive, which I do not think they are. In truth the natives neither intended to keep possession of the vessel as their own nor to return it to the owners. Their object was plunder, and to facilitate that object they seized the vessel, not caring what became of it after their main object, that of plunder, was effected.

1883

JOHNSTON v. HOGG.

Being clearly of opinion that the acts of the natives amounted to a seizure within the meaning of the warranty, I must direct the verdict and judgment to be entered for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Parker, Garrett, & Parker.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

W. A.

1883

March 21.

DAVIS & SON *v.* MORRIS.

Practice—Action against Partners in Name of Firm—Right to proceed against existing Partners together with former Partner—Presumption as to Partners intended to be sued as Defendants under Name of Firm—Judgment by Default—Order XVI. r. 10; *Order XLII. r.* 8.

Part 475

The plaintiffs having brought an action and obtained judgment against the firm of "H. & D.," applied to a judge under Order XLII. rule 8, for leave to issue execution against M. as being a member of the firm. It appeared that the action was upon a bill of exchange drawn by D. at a time when M., H. & D., were partners in the firm of H. & D., but that M. had retired from the partnership prior to the issuing of the writ, and that the firm of H. & D. then continued, but consisted of H. & D. only. The bill was drawn without the knowledge or consent of M., and for a purpose unconnected with the partnership:—

Held, by Watkin Williams, J., first, that under Order XVI. rule 10—which enables two or more persons being liable as co-partners to be sued in the name of their firm—the right to sue partners in the name of a firm is not limited to the case of partners carrying on business at the date of the writ; secondly, that it was a question of fact, having regard to the circumstances and the proceedings subsequent to the writ, whether the plaintiff intended to sue under the firm name those partners only who were members of the firm at the commencement of the action, or the same persons together with any former partner.

Ex parte Young (19 Ch. D. 124) considered.

ISSUE under Order XLII. rule 8, to determine the liability of the defendant upon a judgment obtained by the plaintiffs against the firm of "Harvey & Davids."

March 6, 7. The case was tried before Watkin Williams, J., without a jury.

Holl, Q.C., and *H. T. Atkinson*, for the plaintiffs.
Addison, Q.C., and *Kisch*, for the defendant.

Cur. adv. vult.

The facts and arguments are fully stated in the judgment.

March 21. WATKIN WILLIAMS, J. This is an issue directed under Order XLII., rule 8, of the Judicature Rules, to try and determine the liability of the defendant, against whom the plaintiffs sought to issue execution upon a judgment obtained by them against partners in the firm name of "Harvey & Davids."

The issue was directed under the following circumstances:

On the 23rd of March, 1881, the plaintiffs issued a writ of summons in the High Court of Justice, Queen's Bench Division, directed to "Harvey & Davids, of 117, Bishopgate Street, in the city of London." The indorsement upon the writ was as follows:—

"The plaintiffs' claim is 220*l.* 3*s.*, due on a bill of exchange.

"The following are the particulars:—

"1881. "March 21st. } "To amount due on a bill of exchange, dated 18 Nov., 1880, and payable four months after date, drawn by Francis Davids upon and accepted by T. R. Whorlow, and indorsed by Francis Davids to the defendants, and by them indorsed to the plaintiffs."

At the date of the writ two persons, namely, George Harvey and Francis Davids, carried on business in co-partnership as auctioneers and estate-agents, under the firm name of "Harvey & Davids," at 117, Bishopsgate Street, in the city of London, and at that time they were the only partners in the firm. The writ was duly served upon one of the partners, Francis Davids, at 117, Bishopgate Street, and the two partners duly appeared individually in their own names as required by Order XII., rule 12, and the plaintiffs afterwards, upon the 29th of April, according to the provisions of Order XIV., signed final judgment against them in their firm name of "Harvey & Davids." The plaintiffs failing to obtain satisfaction of the judgment from the said partners, applied under Order XLII., rule 8, for leave to issue execution against Frederick Ellis Morris, as a co-partner in the said firm of "Harvey & Davids," and Morris having disputed his liability, it was ordered that his liability should be tried and determined by the present issue.

The issue was tried before me without a jury, in the Royal

1883

DAVIS v. MORRIS.

Courts of Justice, on the 6th and 7th days of March, 1883, when the following facts were either proved or admitted.

At and previously to the 1st of January, 1880, George Harvey and Francis Davids carried on business in co-partnership as auctioneers and estate agents, at 117, Bishopgate Street, in the city of London, under the firm name of "Harvey & Davids." On the 1st of March, 1880, the defendant Morris joined the co-partnership, which however continued to be carried on in the firm name of "Harvey & Davids," down to the 31st of December, 1880, when the name was changed to "Harvey, Davids, & Morris," under which firm name the three partners continued to carry on business, until the 18th of March, 1881, on which day the partnership was dissolved by the retirement of Morris, under the circumstances presently stated.

The bill upon which the action was brought, was drawn by Francis Davids in his own name, and was by him indorsed in the name of the firm "Harvey & Davids," in November, 1880, at a time when Morris was a partner in the firm, and when the firm name was "Harvey & Davids." By the terms of the deed of partnership, the partners were expressly forbidden to draw, accept, or indorse bills in the name of the firm, and it was proved before me, and not seriously disputed, that as a matter of fact it was not necessary or incidental to the business of auctioneers and estate agents to draw or accept bills, and it was wholly contrary to their practice to do so. Morris was wholly ignorant of the drawing and indorsing of the bill, and the transaction was wholly unauthorised, and in no way whatever connected with the partnership business.

Morris having discovered in March, 1881, that his partners had committed a number of financial irregularities, including the drawing and indorsing the bill in question, took steps to withdraw from the co-partnership, and on the 18th of March it was dissolved by his retirement from it; the use of the firm name of "Harvey, Davids, & Morris," was at the same time discontinued, and George Harvey and Francis Davids resumed business at the same place as partners under the firm name of "Harvey & Davids," and Morris commenced business in his own name as an auctioneer and estate-agent, at 1 and 2, Poultry, in the City.

After the commencement of the action, as before stated, the plaintiffs' solicitor wrote to Morris, the following letter :—

"London, 23rd of March, 1881.

"Sir,—We beg to inform you that the bill of exchange for 250*l.* drawn by Mr. Davids upon and accepted by Mr. Whorlow and endorsed by Messrs. Harvey & Davids to our clients, Messrs. J. Davis & Son, is returned dishonoured, and we have commenced proceedings against Mr. Whorlow and Messrs. Harvey & Davids to recover the amount thereof. In the event, however, of those proceedings proving abortive our clients will have no alternative but to look to you for payment of the amount of the bill.—We are, &c.,

"A. Abrahams & Co.

"To Mr. Morris, 1 & 2, Poultry."

To this letter Mr. Morris's solicitor sent the following reply :—

"London, 24th of March, 1881.

"Dear Sir,—Mr. F. C. Morris has sent me a copy of your letter of yesterday's date having reference to a bill for 250*l.* purporting to be accepted by a Mr. Whorlow.

"If you should determine to proceed against my client upon that bill, please send me the writ, and I will undertake to appear—my client denies all liability thereon.—Yours truly,

"E. G. Lawrence.

"A. Abrahams, Esq.,
"46, Bedford Row, W.C."

No reply was sent to this letter, nor was any other notice or intimation given to Morris of any proceedings having in fact been taken against him.

The defendants George Harvey and Francis Davids having appeared individually in their own names as before stated, the next step taken by the plaintiffs was an application under Order XIV. calling upon the defendants to shew cause why the plaintiffs should not be at liberty to sign judgment against them for the amount indorsed on the writ. The affidavit of the plaintiff Montague Davis in support of the summons was expressed in the following language :

"George Harvey and Francis Davids (trading as Harvey &

1883

DAVIS v. MORRIS.

Davids), the above-named defendants, are justly and truly indebted to us in the amount of the said bill, and I am advised, and believe that there is no defence to this action, and that the appearance has been entered solely for the purpose of delay."

Upon this application an order was made on the 21st of April, 1881, whereby it was ordered that if the defendant Harvey paid into court within a week the sum of 220*l.* 5*s.* 0*d.*, he should be at liberty to defend, but that if that sum should not be so paid the plaintiffs should be at liberty to sign judgment against the said defendant Harvey for the amount indorsed upon the writ,—and it was further ordered that the plaintiffs might sign final judgment against the defendant Davids for the said amount.

On the 29th of April, 1881, the defendant Harvey not having paid the money into court, the plaintiffs signed judgment, and the form of the judgment, after reciting the order of the 21st of April in detail, and the default of the defendant Harvey, ran in these words: "It is this day adjudged that the plaintiffs recover against the said defendants, 224*l.* 4*s.*, and costs to be taxed."

It is material to the present case to pause here for a moment to point out that, according to the grounds of decision in the recent case of *Jackson* v. *Litchfield & Sons* (1), it is doubtful whether the order of the 21st of April, ordering several judgments against each defendant individually, this being an action against a firm, was correctly made. In that case an action was brought against partners in their firm name of John Litchfield & Sons, the writ was duly served on one of the partners, George Litchfield, who made an affidavit that James Litchfield was one of the partners, all the partners, except James Litchfield, appeared individually in their own names, but no appearance was entered for James Litchfield. The plaintiff thereupon applied to have judgment against him for default of appearance, and his application was refused: there can be no doubt that it was properly refused, because had judgment been signed against James Litchfield personally execution would have issued against him as a matter of course and without leave, which, as he had not been served with the writ and had not appeared, would have been opposed to every

(1) 8 Q. B. D. 474.

principle of law, and would have completely over-ridden the protection afforded to defendants in such a case by Order XLII., rule 8. The decision, however, is based not upon this ground but upon the technical ground of procedure that the judgment must follow the writ, and that as the action was against the partners in the firm name there could be no other judgment against them, or any of them, than one in the firm name. Whether this view is correct may be doubted, but, for the present, I am bound to assume that it is a correct exposition of the rule of practice.

The judgment in the present case having been signed in the manner and form before stated, the plaintiffs took out a summons for leave to proceed on the judgment by issuing execution against Frederick Ellis Morris, under Order XLII., rule 8., on the ground that he was liable under the judgment as a co-partner in the firm of "Harvey & Davids." The defendant Morris attended the summons and opposed it, disputing his liability, whereupon, on the 8th of November, 1882, the present issue was ordered to be tried.

These facts may be shortly summarised thus. During the year 1880, different persons at different times carried on business as partners under the same firm name of "Harvey & Davids." From the 1st of January to the 1st of March, 1880, the partners were George Harvey and Francis Davids. From the 1st of March to the 31st of December, 1880, the partners were George Harvey, Francis Davids, and Frederick Ellis Morris. It was during this period, and while the business was being still carried on in the firm name of "Harvey & Davids," that the bill in question was drawn and afterwards indorsed in the firm name by the partner Davids. Neither the bill nor the transaction in connection with which it was negotiated had anything to do with the affairs of the partnership, and it was indorsed by Davids in the firm name without the authority, either express or implied, of the partnership and without the knowledge or consent of the partner Morris, and the latter was in no way liable upon the bill, and had a perfectly good defence on the merits to any action that might have been brought against him upon it either in the firm name or otherwise, he was not therefore a person who could be properly described as a person liable upon the bill or who could be sued with effect.

1883

DAVIS v. MORRIS.

From the 1st of January, 1881, the three partners continued to carry on the business, but under the new firm name of "Harvey, Davids, & Morris," until the 28th of March, 1881, when the partnership was dissolved by the retirement of Morris; after which the partners George Harvey and Francis Davids resumed business under the firm of "Harvey & Davids" at the same place, and Morris commenced business in his own name in the Poultry; during this last period the action against "Harvey & Davids" was commenced and prosecuted to judgment in the form already stated.

The issue to be now determined is whether the defendant Morris is liable to have execution issued against him upon the judgment against "Harvey & Davids" as being a co-partner in that firm. This question, it was stated in argument, depended upon the true construction of the Judicature Rules regulating the novel practice of suing partners in the name of their firm, and respecting which great differences of opinion are said to have been expressed by authorities of no less weight than the Lord Chancellor and Lord Justices Cotton and Brett.

The practice in question had in general no existence before the Judicature Acts. At common law, if a plaintiff wished to proceed against a number of persons as defendants, he was in general bound to name each one individually in his writ, and to serve each one with a copy of the writ. This rule occasioned great inconvenience in certain cases, as for example, in suing the numerous partners in banking and other large co-partnerships, and for remedy of this inconvenience certain enactments were passed by which certain classes of defined co-partnerships became entitled and liable to sue and be sued in the name of a registered public officer as the representative of the whole body of co-partners, as examples 7 Geo. 4, c. 46, relating to banking co-partnerships, and 7 Wm. 4 & 1 Vict. c. 73, relating to co-partnerships under letters patent, and also a large number of private Acts regulating various trading co-partnerships, may be mentioned. In all these cases the proceedings were carried on in the name of a registered public officer, and a judgment so obtained against him was binding upon each one of the co-partners represented by him.

1883

DAVIS v. MORRIS.

In these cases, however, as in every case in which it was sought to proceed to execution against any one alleged to be liable upon the judgment, but who was not individually named upon the record, it was necessary for the plaintiff to take further steps against the particular individual in order to make him personally a party to the judicial proceedings before execution could issue against him, and this was in general done by a writ of scire facias quare executionem non, which called upon him to shew cause why the plaintiff should not be allowed by the Court to proceed to execution against him upon the judgment. And in these new proceedings it was competent for the defendant to dispute his liability upon the judgment; no difficulty or inconvenience was experienced in working this machinery in practice; but then it will be at once observed that under these statutes, by means of the machinery of registration which included the name of the co-partnership, the names of the individual co-partner, and the dates of all changes in the partnership and a variety of other details, and also by means of the introduction of substantial changes in the law of partnership liability, all difficulties as to which individual, past or present, partners were liable upon a judgment against a public officer, and to what extent and in what order the liability of the partners could be enforced, were removed. Apart from the cases within those particular enactments, the power and liability of co-partners to sue and be sued in their common or firm name as a single persona was wholly unknown to the law before the Judicature Rules and Orders of 1873–5, and it becomes now necessary to see from the language of these rules what change has been made in the practice.

Order XVI., rule 10, under the head of "parties" provides as follows: "Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any, and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

Order IX., rule 6, under the head of "service of writ" provides: "Where partners are sued in the name of their firm, the

1883

DAVIS v. MORRIS.

writ shall be served either upon any one or more of the partners, or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there."

Order XII., rule 12, under the head of "appearance" provides: "Where partners are sued in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Order XLII., rule 8, under the head of "execution" provides: "Where a judgment is against partners in the name of the firm, execution may issue in manner following: (*a*) against any property of the partners as such; (*b*) against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner; (*c*) against any person who has been served, as a partner, with the writ of summons, and has failed to appear; if the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to a Court or a judge for leave to do so, and the Court or a judge may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

The question which is said to arise in the present case upon the construction of these rules is thus stated:—Suppose an action to be brought against several persons sued in a firm name, and it turns out that at different times the firm or partnership has been differently constituted, and that it was differently constituted at the time when the contract sued upon was entered into to what it was when the action was brought, the firm name continuing the same throughout in such a case, is the action to be considered as an action brought against the persons who were the partners carrying on business at the date of action brought, or against the persons who carried on the business at the date of the incurring the obligation sued upon?

This question was raised and discussed, but not finally decided, in *Ex parte Young*. (1) In that case a debtor summons had been

(1) 19 Ch. D. 124.

1883

DAVIS v. MORRIS.

issued under the Bankruptcy Act, 1869, against Young upon a judgment signed against a firm of "Griffin, Young, Burbridge, & Young," in which it was said that he was a partner. Young applied to the Court to have the summons dismissed, upon the ground that, although he had been a partner, yet before the action was commenced the partnership had been dissolved by his retirement from the firm, that the remaining partners continued to carry on the business in the old name, and that he had had no notice of any action having been brought until the present summons was served upon him. To this the creditor replied that the claim in respect of which the action had been brought against the firm had accrued before the dissolution, and during the time that Young was a partner. The Chief Judge in Bankruptcy refused to dismiss the summons, and Young appealed. The appeal was heard before the Lord Chancellor and Cotton and Brett, L.JJ. Brett, L.J., was of opinion that the debtor summons was well founded upon the judgment, and ought not to have been dismissed; he was of opinion that the action against the partners in the firm name included Young as a defendant, upon the ground that he was a partner in the firm at the time that the liability sued upon was created. He based his opinion upon the particular language of Order XVI., rule 10, which says, not that a firm may be sued, but "two or more persons liable as co-partners may be sued in the name of their firm, if any," from which language he considers that the rule defines the persons sued in the firm name as being those persons who were liable as co-partners at the time the liability was incurred, and who alone could be said to be liable as co-partners, and who alone could be sued with effect for the claim sought to be enforced. Cotton, L.J., on the other hand, expressed the opinion that the judgment could not be considered as one against Young, and thought that according to the true construction of the rule those persons only could be sued in the firm name who were carrying on business and were using that name at the time that the action was brought. He arrived at this conclusion from a consideration of the special machinery provided for the service of the writ and the conduct of the subsequent proceedings in actions against persons in their firm name. The Lord Chancellor agreed with Cotton, L.J., in dis-

1883

DAVIS v. MORRIS.

missing the summons, but he placed his judgment upon the ground that in any view a judgment against persons in a firm name was not a good debt upon which to found a debtor's summons against an individual who up to that time had not been made personally a party to the proceedings, and he considered it neither necessary nor desirable in that form of proceeding to determine the question raised as to the construction of the rules.

Now, it appears to me that, without questioning for the moment the correctness of either the one or the other of the opposite opinions of the Lords Justices as applied to the particular facts of Young's case, it may well be considered that neither view presents, as indeed neither professes to present, a full and exhaustive interpretation of the rules as they have to be applied to a different state of facts.

Order XVI. is expressed in somewhat general and ambiguous language, and it seems to me that those who framed the rules had in contemplation nothing beyond the simple proposition of several persons carrying on business as co-partners in a firm name, whom it was desired to sue in the convenient form of their collective name in respect of some co-partnership liability, and that they did not specifically contemplate cases complicated by changes in the constitution of the partnership or otherwise. It becomes necessary, however, in the present case, as in many others, to interpret the language of an enactment in its application to facts which were not present to the minds of those who framed the law.

It certainly seems reasonable and convenient, where several persons are carrying on business as co-partners at a particular place in a firm name, that a writ should issue against them in their firm name, and should be well served upon all the co-partners by service upon one of them, or upon their manager at their principal place of business, because it would be fair to assume in general that each would do his duty, and doing so that each of the co-partners would in due course receive notice of the proceeding, and have an opportunity of defending himself; it becomes, however, a widely different affair when you have to deal with the cases of co-partnerships which have been dissolved, and in which changes have taken place by the retirement of former

partners and the introduction of new ones, and possibly changes in the situation of the place of business, and where little or nothing remains unchanged beyond the old firm name; to many of such cases it certainly does seem to me that the new machinery in its present crude form is very ill suited and highly calculated to lead to confusion and injustice.

Cotton, L.J. considers that where an action has been brought against persons in a firm name, it must be considered as an action against the existing partners in the firm, because in his view it is against them alone that the rules authorize an action to be brought in that form. Brett, L.J., applies an entirely different test, considering that, according to the true construction of the rule, the right to sue in this form is not limited to the case of existing partnerships, but extends in terms to any case where persons carrying on business as co-partners have contracted a liability, and he points to the language of the rule, which declares not that a partnership, which might mean an existing partnership, may be sued, but that "any two or more *persons being liable* as co-partners may be sued in their firm name, if any," which certainly does not in terms limit the use of this form of proceeding to the cases of persons actually carrying on business as partners at the time of action brought; upon this point, judging from the language used in *Young's Case*, especially from that of the Lord Chancellor (1), a contention was put forward on the part of Young, which ought to be noticed, and it was this, that partners cease upon a dissolution of partnership to be liable as co-partners upon debts contracted during the continuance of the partnership. This contention seems to me to be wholly untenable. The liability of partners as such is nothing more than the liability of co-contractors, and rests upon the principle of agency, each partner having a certain implied power to bind the others, and it is impossible to say that the mere dissolution of the partnership, and the determination of this implied power absolves the partners from obligations already incurred, or deprives the partners of the implied power of binding each other in carrying out and fulfilling partnership obligations still in dependence at the date of dissolution.

(1) 19 Ch. D. 124, at p. 131.

1883

DAVIS v. MORRIS.

If, however, what was meant by the contention was that by the dissolution the partners were deprived of the power of accepting service of a writ for their co-partners, it is altogether inapplicable, because partners as such have no such power, even during the continuance of the partnership. It appears to me that the words "two or more persons liable," as used in the rule, are words of mere description referring to the persons whom a plaintiff seeks to sue and make liable, and that they cannot be treated as words of definition intended to determine by the test of liability what persons are to be regarded as the defendants, in case an action has been brought against a number of individuals sued in a collective name.

It must not be lost sight of that the question in these cases is whether a particular individual is or is not a defendant in an action brought against a number of persons in a collective or firm name, and it would certainly produce some curious consequences in certain cases if this is to be determined by the simple test of liability as a co-partner in respect of the cause of action sued upon. It is scarcely necessary to point out that a person may have been a member of a co-partnership at the date of an obligation alleged to be binding upon the firm, and yet that he may not be liable as a co-partner, or at all. May it, however, be said that the words "liable as a co-partner," when used in this way as a test mean "liable, assuming that there is a partnership liability?" This, however, is a variation of the language, and does not follow the words of the rule upon which so much stress is laid, and is not, I think, an admissible interpretation. In the present case the defendant Morris was certainly not a partner in the firm of "Harvey & Davids" at the time the action was brought against that firm, therefore, according to one construction of the rule, he was not a defendant in that action and not liable upon the judgment, and therefore not liable to have execution issued against him; but it is equally clear that, although he was at one time a partner in the firm of "Harvey & Davids," and also at the time when one of the partners, assuming to act with the partnership authority and in the partnership name, incurred the obligation upon which the action was brought, yet to follow the words of the rule, he was not a "person liable as a co-partner," and, there-

fore, according to another construction of the rule, he was not a defendant, and therefore not liable to execution on the judgment. Therefore, quâcunque viâ, the defendant would not be liable to the execution. It appears to me, however, that, according to the true construction of the rule, the words "two or more persons being liable as co-partners may be sued," &c. are, as I said before, mere words of description, and that the rule confers upon a plaintiff, if he desires to sue several persons whom he seeks to charge jointly as co-partners, the right and option of suing them in the collective name, if they have been in the habit of using such a name, and that this right is not limited by any words in the rule, or by necessary implication from the language, to the case of a partnership actually existing at the date of the writ. It may be that in certain cases after a dissolution of partnership, a plaintiff may find it very difficult, and perhaps impossible to serve the writ so as to avoid future embarrassments. But when a plaintiff issues a writ against a number of persons in a firm name, and there have been as in the present case two distinct partnerships carried on by different sets of individuals under the same firm name, and at the date of the action one of such partnerships has been dissolved, and the other is subsisting, then, in my opinion, it becomes a question of fact which set of persons has been proceeded against under the name common to both.

In the present case, when the plaintiffs brought this action against "Harvey & Davids," were they proceeding against George Harvey and Francis Davids only, or were they proceeding against George Harvey, Francis Davids, and Frederick Ellis Morris? Now, in the first place, whatever doubts may exist as to the right of the plaintiffs to sue the three partners in the early name of their dissolved partnership, no one can doubt their right to sue the two persons George Harvey and Francis Davids in their newly adopted style, and not the less so because it was the ancient firm name in use when there were other partners in the firm. The only question then is, did they do so; or did they sue the firm as formerly constituted? To which conclusion do the facts point? In my opinion the facts shew that they intended to sue the two partners in the existing firm; then is there

1883

DAVIS v. MORRIS.

anything in the language of the rules themselves, or any single fact in the case, which forbids this conclusion, and requires the action to be necessarily regarded as having been brought against the former partners? I own I can see nothing. It was clearly competent to the plaintiffs to sue the two partners exclusively in the form which they adopted. It was clearly their intention to do so; every step in the action shews that they in fact did so, and that they excluded Morris; and there is nothing in the law or in these rules to prevent proper effect being given to their intention and their acts, and any other conclusion would, in my opinion, be contrary to the law and the facts and the justice of the case.

Morris was therefore not a defendant in the action, and not liable to execution upon the judgment.

Assuming, however, this conclusion to be erroneous, and that according to the correct interpretation of the rules and a correct application of them to the present facts, Morris was made a defendant in the original action, and was bound by the judgment, there is still a further view, according to which the plaintiffs ought not to be allowed to issue execution against him, and it is this: assuming that the judgment is one binding upon the defendant Morris so long as it stands, it ought, in my opinion, to be set aside altogether, upon the ground that the plaintiffs by their conduct misled the defendant, and by causing him to believe that no action had been brought against him induced him to abstain from taking proper steps to defend himself, as he might and would have done, successfully, if he had not been so misled by them. The only doubt that I entertain upon this point is whether it can be made available upon the trial of this issue, and whether the trial of the issue ought not to proceed upon the footing of the judgment being valid and unimpeachable. I think, however, the point is open to the defendant, and it will be found according to the old practice in scire facias—that although it was not competent in general for a defendant to plead in the scire facias matter of defence to the original action, yet it was competent for him to shew that the judgment had been obtained by collusion between the plaintiff and the nominal defendant, or to shew that as to some of the causes of action included in the judgment he personally was not liable: see *Lord Egremont's*

Case (1); *Fowler* v. *Rickerby* (2); *Harvey* v. *Scott* (3); *Dodgson* v. *Scott*. (4)

I find the issue, therefore, in favour of the defendant, and I state the foregoing facts as a special finding and verdict for the purpose of disposing of the plaintiffs' pending summons for leave to issue execution.

Judgment for the defendant. (5)

Solicitors for plaintiffs: *Lawrence & Son.*

Solicitor for defendant: *Abrahams.*

A. P. S.

[IN THE COURT OF APPEAL.]

1883

Jan. 11.

DYMOCK *v.* WATKINS.

County Court—Right of Defendant to sum up Evidence.

An action remitted from the Queen's Bench Division to a county court was tried before the county court judge with a jury. After the defendant's evidence had closed his counsel claimed to address the jury, but the judge refused to allow it. The jury having given a verdict for the plaintiff the defendant applied for a rule nisi for a new trial on the ground that his counsel ought to have been allowed to sum up the evidence:—

Held, affirming the decision of a divisional court, that as the right claimed did not exist at common law, and the 18th section of the Common Law Procedure Act, 1854, which gave such a right in the superior Courts, did not apply to county courts, there was no ground for interfering with the practice of any county court in which the defendant was not allowed to sum up the evidence.

THIS was an action commenced by a builder in the Queen's Bench Division to recover 31*l.* 8*s.* 4*d.* claimed by him to be the balance remaining due of a bill of 51*l.* 8*s.* 4*d.*, for repairs done to a house of the defendant. The defendant alleged in his defence that the work was left incomplete, and that the 20*l.* which he had paid was sufficient to satisfy the plaintiff's claim. Issue was joined on the 4th of May, 1882. On the 9th of May, 1882, an order was made remitting the action to the Westminster County Court. The cause was tried on the 11th of December, before the county court judge with a jury. The plaintiff, and several

(1) 6 Q. B. 587.
(2) 2 M. & G. 760.
(3) 11 Q. B. 92.
(4) 2 Ex. 457.
(5) See *Munster* v. *Railton*, *post*, p. 475.

1883

DYMOCK v. WATKINS.

witnesses on his behalf, were examined, cross-examined, and re-examined, and the defendant was examined, cross-examined, and re-examined, and a witness on his behalf examined and cross-examined. The defendant's counsel then claimed to address the jury, but the judge held that he had no right to do so. The jury gave the plaintiff a verdict for the amount claimed, less 4*l.* 12*s.*

The defendant moved before a divisional court for a rule nisi for a new trial, on the ground that his counsel ought to have been allowed to address the jury. Hawkins and Watkin Williams, JJ., refused the rule. The defendant renewed the application before the Court of Appeal.

T. Terrell, for the appellant:—

The defendant's counsel would, if the action had been tried in the superior Court, have had a right to address the jury on the evidence, and where an action is remitted to a county court he should have the same right, since the jurisdiction of the superior Court remains, as stated by Lush, J., in *Balmforth* v *Pledge*. (1)

[JESSEL, M.R.:—That case seems to me rather to shew that the case is to be tried in the same way as any other county court action.]

There is nothing in the County Court Acts or rules to take away from a party to an action remitted to a county court any right which he would have had if it had been tried in one of the superior Courts.

[LINDLEY, L.J., referred to Heywood's County Court Practice, 2nd ed. p. 180: "The defendant opens his case in a similar manner to the plaintiff, examines his witnesses, and in some courts is permitted to sum up his evidence. In others the judge does not permit a second speech by the defendant."

BOWEN, L.J. You must shew that the right you claim exists at common law or is given by statute. It certainly does not exist at common law. On what statute then do you rely? The 18th section of the Common Law Procedure Act, 1854, does not apply to county courts.]

In Pitt-Lewis' County Court Practice, vol. i. p. 480, it is observed that to allow a summing-up is in accordance with the

(1) Law Rep. 1 Q. B. 427, 431.

spirit of the legislature, though the section does not apply to county courts.

JESSEL, M.R. There is no law with which I am acquainted that lays down any rule as to the mode of conducting a county court trial, so far as relates to the question now before us. Before the Common Law Procedure Act, 1854, there was not in the superior Courts any such right as is now claimed. That Act altered the practice in the superior Courts of Common Law, and there is a difference of opinion whether the change was beneficial. The 18th section of that Act does not apply to county courts and therefore does not bind a county court judge. That this action was remitted to the county court from a superior Court, makes, to my mind, as I said during the argument, no difference. It is to be tried like any other county court action, and if it is not the practice in this particular county court to allow the defendant to address the jury after putting in his evidence, I think that we ought not to interfere with that practice. I think that the divisional court was right.

LINDLEY, L.J. I am of the same opinion. It is admitted that the 18th section of the Common Law Procedure Act, 1854, does not apply to county courts, and the right now claimed does not exist at common law. I therefore see no ground on which it can be claimed in a court in which it has not been the practice to allow it.

BOWEN, L.J. I am of the same opinion. The appellant must shew that he has been deprived of a right, or that there has been a miscarriage of justice. I see no such right and no such miscarriage.

Appeal dismissed.

Solicitor for appellant: *T. E. Watkins.*

H. C. J.

1883
Feb. 14.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* NASH.

In re CAREY, AN INFANT.

Infant—Right to Custody of Illegitimate Child.

A woman placed her illegitimate female child soon after its birth with N. and wife, who were labouring people, intending to pay them for it. She fell into ill health and was unable to continue her payments, but N. and wife continued to maintain the child till it was nearly seven years old. The mother then applied to have the child delivered to her, which N. and wife refused. She therefore applied for a habeas corpus, which was refused by North, J., but granted by a divisional Court. N. and wife appealed. The mother, who was a kept mistress, did not propose that the child should live with her, but with a respectable married sister, whose husband was in a station superior to that of N. :—

Held, that the appeal must be dismissed, for that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the Court.

ROSE CAREY, a girl not quite fifteen years of age, was seduced in 1875, and was shortly afterwards turned out of her father's house. She was delivered of a female child on the 14th of May, 1876. Shortly after the infant's birth the mother placed it in the custody of Emma Nash, the wife of William Nash, a labouring man. She then obtained a situation, but fell into ill health and went into an infirmary. She made some payments to Nash and wife for the child, but was unable to continue them. After leaving the infirmary she became kept mistress to a gentleman. The child continued with the Nashes up to the present time. The mother had in 1880 summoned Nash before the justices of the peace under 24 & 25 Vict. c. 100 for unlawfully detaining the child, but the summons was dismissed. In December, 1882, she applied for a habeas corpus to bring up the child that it might be delivered to her, but the application was refused by Mr. Justice North. The mother then appealed to a divisional Court, and on the 5th of February, 1883, the Court (Pollock, B., and Manisty, J.), reversed the decision and ordered that the habeas corpus should issue. Nash and wife appealed.

It was proposed by the mother that the child should not live with her but with a sister of hers, who was the wife of Henry Wright, a clerk in the employment of The Press Association,

Limited, and had one child three years old. Wright deposed that he was willing to take the guardianship of the infant and bring her up with his own child.

Fraser, for the appellants. This case is similar to *Re White* (1), where, under very similar circumstances, the Court refused to give an illegitimate child of eight years old into the mother's custody, the child being well taken care of and wishing to stay where she was: Simpson on Infants, p. 127. The Court will, if necessary, see the child and ascertain its wishes.

[JESSEL, M.R. I have never consulted so young a child, and it has not been the practice of Courts of Equity to do so.]

The Court will have regard to the advantage of the child: *Andrews* v. *Salt* (2); and the character of the mother is such that it cannot be for the child's benefit that it should be given up to her.

[JESSEL, M.R., referred to the observations of Maule, J., in *Re Lloyd.* (3)]

Reed, contrà, was not called upon.

JESSEL, M.R. I am of opinion that the order appealed from is clearly right. An unfortunate girl was seduced under the age of fifteen and had a child—her father turned her out of doors. She placed the child with two poor people whom she intended to pay for maintaining it. She paid something, having got a situation. Her health failed and she could not continue her payments. She was obliged to go into an infirmary, and on coming out fell in with a gentleman with whom she lives as a kept mistress. She is therefore leading an immoral life. She wishes to have the child and the nurse wishes to keep it. The appellants have not a particle of right to the custody of the child, and they set up the case that the child's natural mother is no relation to it, and has no more claim to its custody than any stranger. In a reported case Maule, J., a very eminent judge, is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed to think that this was said ironically —but if not, the judge in making the observation must have been

(1) 10 L. T. (O. S.) 349. (2) Law Rep. 8 Ch. 622.
(3) 3 M. & G. 547.

1883

THE QUEEN v. NASH.

referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child. In the case of *Ex parte Knee* (1) before Sir James Mansfield, it was held that she had such a right unless ground was shewn for displacing it. The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child. Here the mother does not wish the child to be with her, but to be placed with her sister, a respectable married woman with one child, the husband is a clerk in the employ of the Press Association, and is therefore in a station superior to that of the appellants, and how it can be contended that it is for the benefit of the child to remain with the appellants I do not see.

LINDLEY, L.J. I am of the same opinion. We cannot interfere with the right of the mother in favour of persons who are mere strangers. There is indeed no legal relationship, but there is a natural one, and the affection of the mother for the child must be taken into account in considering what is for the benefit of the child. The right of the mother as against the appellants is to my mind clear.

BOWEN, L.J. I believe that the appellants are acting with a view to the benefit of the child, but philanthropy sometimes makes mistakes. The question is whether in considering what is for the benefit of the child the Court will have regard to natural relationship. When we consider what is for the child's benefit, the scale is turned by the respectability of the persons with whom she is to be placed.

Appeal dismissed.

Solicitor for appellants: *A. R. O. Stutfield.*
Solicitor for respondent: *T. D. Dutton.*

(1) 1 B. & P. N. R. 148.

H. C. J.

MITCHELL *v.* THE DARLEY MAIN COLLIERY COMPANY.

1883
March 20.

Practice—Appeal—Order as to Costs only—Discretion of Court—Costs of Inspection—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.

An order was made in chambers for the inspection of the defendants' property, the costs of the inspection to be paid by the plaintiff:—

Held, that under Order LII. r. 3, the judge had a discretion to order the plaintiff to pay the costs, and the order being made in his discretion the plaintiff had no right without leave to appeal from it.

In this case, Hawkins, J., in chambers, upon the application of the plaintiff, made an order for the inspection of the defendants' mines and workings, but made it a term of the order that the plaintiff should pay the costs of the inspection in any event. The plaintiff appealed from the part of the order which related to costs.

Archibald, for the defendants. There is a preliminary objection that the judge not having given leave to appeal, the plaintiff under s. 49 of the Judicature Act, 1873, has no right of appeal. (1)

Bigham (*Stansfeld*, with him), for the plaintiff. The costs which the plaintiff was ordered to pay were not in the discretion of the judge, and there can therefore be an appeal from the order. The costs were not incident to the summons taken out by the plaintiff, but related to a future proceeding.

[Cave, J., referred to *Vicary* v. *Great Northern Ry. Co.* (2)]

Where the plaintiff is enforcing a legal right and there has been no misconduct on his part, the Court has no discretion to to deprive him of costs. Per Jessel, M.R.: *Cooper* v. *Whittingham.* (3)

Archibald, in reply.

Cur. adv. vult.

(1) The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to an appeal, except by leave of the Court or judge making such order."

Order LII. r. 3: It shall be lawful for the Court or a judge upon the application of any party to an action, and upon such terms as may seem just, to make an order for the inspection of any property.

(2) 9 Q. B. D. 168.

(3) 15 Ch. D. 504.

1883

MITCHELL v. DARLEY MAIN COLLIERY CO.

March 20. The judgment of the Court (Cave, J., and Day, J.), was delivered by

CAVE, J. In this case a preliminary objection was taken by Mr. Archibald, that the appeal was an appeal as to costs only, from an order of a judge at chambers, in a matter where the costs are by law left to the discretion of the judge.

The learned judge made an order that the plaintiff should have inspection of the defendants' property, but ordered that the plaintiff should pay the costs of the inspection, and the question is whether these costs are costs of or incident to a proceeding in the High Court.

We are of opinion that they are costs incident to a proceeding in the High Court. By Order LII. r. 3, a judge may make an order for the inspection of any property on such terms as may seem just. Now, it cannot be doubted that the application for the order and the making of the order are proceedings in the High Court, and it seems to follow that the costs of the inspection which is consequent upon the order of the Court, and which but for that order would not take place at all, are costs which are incident to a proceeding in the High Court. It was contended that the plaintiff was entitled to appeal in this case on the ground that the liability to pay these costs was made a condition of the inspection, but that argument goes too far, for it would apply to an order to pay the costs of the application, which undoubtedly are costs of a proceeding. Moreover, the judge must direct how the costs of inspection are to be paid, or they cannot be recovered by either party, and the construction contended for would give the plaintiff a right to appeal if he were ordered to pay the costs, but none to the defendant if he were ordered to pay them.

It was also suggested in the course of the argument that a distinction might be drawn between costs incurred at the date of the order and the costs to be incurred subsequently, but it is every day's practice at chambers to deal with the costs of answering interrogatories or inspecting documents before answer or inspection, and it seems to us impossible to say that such costs are not incident to a proceeding in the High Court, and that

1883

MITCHELL v. DARLEY MAIN COLLIERY CO.

such an order is not made by the judge in the exercise of his discretion.

We must consequently hold that the objection is fatal and the appeal must be dismissed with costs.

Order affirmed.

Solicitor for plaintiff: *Somerville.*

Solicitors for defendants: *Singleton & Tattersall.*

A. P. S.

HUNNINGS *v.* WILLIAMSON.

1883

April 3.

Practice—Action for Penalties—Discovery—Interrogatories—Order XXXI. rr. 1, 12.

In an action for penalties the plaintiff is not entitled to administer interrogatories or to discovery of documents under Order XXXI., that order not being intended to give the right to discovery in cases where prior to the Judicature Acts discovery was not obtainable.

ACTION to recover penalties from the defendant under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 54, for having acted as a vestryman after ceasing to be a vestryman by reason of being interested in a contract with the vestry of which he was a member. The plaintiff had administered interrogatories which a master had ordered the defendant to answer. On appeal to a judge at chambers against the order of the master, he referred the matter to the Court.

Jan. 26. *R. Vaughan Williams,* for the defendant. Before the Judicature Acts interrogatories could not be administered to the defendant in an action of ejectment, as that would involve a forfeiture of his estate: *Horton* v. *Bott* (1); *May* v. *Hawkins* (2); *Pye* v. *Butterfield* (3); nor would the Court of Chancery allow them in a suit the sole object of which was to convict the defendant in a penalty: *Chadwick* v. *Chadwick.* (4) The Judicature Acts have made no alteration in the right of the parties to discovery by interrogatories, but only in the procedure, and there cannot be discovery now where the Court of Chancery would have refused it: *Lyell* v. *Kennedy.* (5)

(1) 2 H. & N. 249.
(2) 11 Ex. 210.
(3) 5 B. & S. 829.
(4) 22 L. J. (Ch.) 329.
(5) 20 Ch. D. 484.

See also 11 Q.B.D. 583.

1883

HUNNINGS v. WILLIAMSON.

[He also cited *Paxton* v. *Douglas* (1); *United States of America* v. *McRae* (2); Day's Common Law Procedure Acts, 3rd ed. p. 258.]

Lumley Smith, Q.C., and *Edward Pollock*, for the plaintiff. The right to administer these interrogatories depends on the rules under the Judicature Acts. The words of Order XXXI. r. 1, are absolutely general, and a plaintiff is entitled to administer interrogatories subject to the provisions of rule 5 for the protection of defendants. By the latter rule the party interrogated must answer, or state his objections in the affidavit in answer, unless the interrogatories be unreasonable, vexatious, or scandalous. A defendant may be interrogated though his answers would expose him not merely to a penalty but to a prosecution for an indictable offence: *Fisher* v. *Owen* (3); and such interrogatories were allowed before the Judicature Acts: *McFadzen* v. *Mayor of Liverpool.* (4) The general power of administering interrogatories given by the rules made under the Judicature Acts is an alteration of procedure and not of law. *Lyell* v. *Kennedy* (5) is not in point; in that case an affidavit had been made in answer shewing the ground of objection.

[They also cited *Scott* v. *Miller.* (6)]

R. Vaughan Williams, in reply. *Fisher* v. *Owen* (3) is inapplicable; that was not an action the whole object of which was to enforce a penalty.

[He referred to Story on Equity Pleading, sec. 322.]

MANISTY, J. This is an action to recover penalties from the defendant under the 54th section of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), for voting as a vestryman while interested in a contract with the vestry. The plaintiff has administered interrogatories to the defendant, which are not before us, we having only to deal with the abstract question of the right to administer them. It is contended on behalf of the defendant that that right does not exist, and that the master's order requiring the defendant to answer was wrong.

(1) 19 Ves. 225.
(2) Law Rep. 3 Ch. 79.
(3) 8 Ch. D. 645.
(4) Law Rep. 3 Ex. 279.
(5) 20 Ch. D. 484.
(6) 28 L. J. (Ch.) 584.

The ground of this contention is that before the passing of the Judicature Acts a court of equity would not give incidental relief by way of discovery in a suit, where the whole object was to convict the defendant in a penalty, and that the law is still unaltered. The defendant's counsel relied mainly on the case of *Chadwick* v. *Chadwick* (1), which seems to go the whole length of shewing that in an action such as the present, before the Judicature Acts, a Court of Equity would not have allowed interrogatories to be administered to the defendant. The passage cited from Story is an authority in favour of this view.

The plaintiff contended that the law has been altered by the rules and orders made under the Judicature Acts, and that *Fisher* v. *Owen* (2) was an authority in his favour; to which it was answered that that was an action in which interrogatories could be administered, while in the present case the right to administer them does not exist. That case only decided that the mere fact that an interrogatory might tend to criminate the party interrogated was no ground for striking it out, but that the objection must be taken in the affidavit in answer, a decision which does not seem to affect the present case. But the case on which the defendant's counsel mainly relied, in support of his contention that the law had not been altered by the rules and orders made under the Judicature Acts, was that of *Lyell* v. *Kennedy*. (3) I am unable to distinguish that from the present case. It was only decided last year, and subsequently to the making of the new rule in Order XXXI., and the Court of Appeal came to the conclusion that the law on this point remains the same as it was before the passing of the Judicature Acts. I think we are bound by that decision.

STEPHEN, J. I am of the same opinion, though I have not arrived at this conclusion without misgiving. I feel that the Judicature Acts and the orders made under them, when looked at apart from the interpretation which has been placed on them, would convey at first sight a different meaning from that which has been given to them by previous decisions. I do not,

(1) 22 L. J. (Ch.) 329.

(2) 8 Ch. D. 645.

(3) 20 Ch. D. 484.

1883

HUNNINGS v. WILLIAMSON.

however, dissent from that interpretation, though I think it is not the most natural and obvious meaning of the words.

The question in this case turns on Order XXXI. The first rule is perfectly general, and enables either party to an action to deliver interrogatories to the opposite party. Then come rules as to particular persons, and then rules affecting the answers. The old rule, which was in force at the time of the decision of *Fisher* v. *Owen* (1), was that application might be made to strike out an objectionable interrogatory. The substance of the new rule now in force is that application may be made to strike out interrogatories that are unreasonable, vexatious, or scandalous, but that in other cases the objection must be taken in the affidavit in answer. Upon those rules plaintiff's counsel forcibly and fairly argued that the defendant in this case was bound to raise his objection in his affidavit. But it has been held in many cases, and especially in *Lyell* v. *Kennedy* (2), that the Judicature Acts have not established a new system with regard to interrogatories; they have altered merely the practice, and not the law. The effect of those cases is to say that, where the Court of Chancery used to allow them, they will be allowed now; in fact the decisions attach a sort of technical meaning to the term "interrogatory." Such a reading simplifies the question in the present case. The authorities seem to establish the rule that, where the object of interrogatories is nothing but to make a man liable to a penalty, they cannot be administered at all; but that in cases where they may be administered you may force a man to say on oath that he objects to answer a particular interrogatory on the ground that his answer might subject him to a penalty. If that is the law, it is to be regretted that it has not hitherto been stated in clearer form; but I see no other way of reconciling the authorities with the words of the rules under the Judicature Acts.

Order rescinded.

The plaintiff having also applied for an order for discovery of documents by the defendant, and a master having made an order accordingly, the defendant appealed against this order to a judge at chambers, by whom the matter was referred to the Court.

(1) 8 Ch. D. 645. (2) 20 Ch. D. 484.

April 3. *R. Vaughan Williams*, for the defendant, moved to rescind the order. It was well settled before the Judicature Acts that the Court of Chancery would not give discovery in an action for a penalty. It has been held in this very case that interrogatories could not be administered, on the ground that the law remains the same in this respect as before the Judicature Acts.

Lumley Smith, Q.C., and *Edward Pollock*, for the plaintiff, in support of the order. On the previous application with regard to interrogatories, the plaintiff relied on the terms of Order XXXI. rule 1, which, construed as they stand, apply to all actions. The Court, however, thought that they were bound by the decision of the Court of Appeal in *Lyell* v. *Kennedy* (1), which proceeded upon the principle that Order XXXI. was not intended to enlarge the right to discovery, and consequently must be taken to apply only in cases where interrogatories might have been administered according to the old practice. But the decision in *Lyell* v. *Kennedy* (1) has been overruled by the House of Lords (2), though not on the ground, it is true, that the principle so laid down by the Court of Appeal was wrong, but on the ground that the interrogatories might in that case have been administered under the old practice. The views expressed by the Court of Appeal, must, however, under these circumstances be considered merely as obiter dicta, and not binding on this Court. It must be admitted that according to the old practice in equity there could not have been discovery for the purposes of this action, but it is contended that the case comes exactly within the terms of Order XXXI, rule 12, and that the practice as now established goes further than the old equity or common law practice with regard to discovery. Interrogatories are now allowed in an action of libel: *Webb* v. *East* (3); and the defendant must take the objection that they may criminate him in his answer on oath.

[They also cited *Fisher* v. *Owen* (4); *Bolckow, Vaughan, & Co.* v. *Fisher* (5); *Parker* v. *Wells.* (6)]

(1) 20 Ch. D. 484.
(2) Weekly Notes, March 24, 1883, p. 52.
(3) 5 Ex. D. 108.
(4) 8 Ch. D. 645.
(5) 10 Q. B. D. 168.
(6) 18 Ch. D. 177.

1883

HUNNINGS v. WILLIAMSON.

WATKIN WILLIAMS, J. I am of opinion that the order for discovery must be rescinded. The counsel for the plaintiff relied on Order XXXI., but I do not think that that order is to be construed as he suggested. I do not think it was intended by that order to introduce any novelty into the law concerning discovery. I do not put my judgment merely on the ground that the Court of Chancery would not have assisted the plaintiff in an action like the present by granting discovery; but the ground I decide upon is that Order XXXI. merely provides that the parties shall be entitled to discovery in accordance with the terms of the order in cases where, according to the law and practice in courts of law or equity, there would have been a right to discovery previously to the Judicature Acts. I do not think that it was intended to enlarge or alter the scope of the right to discovery by that order. It is admitted that this case does not come within the principles upon which previously to the Judicature Acts discovery was granted at law or in the Courts of Chancery.

MATHEW, J. I am of the same opinion. I think that the true construction of Order XXXI. is that it only applies to cases where discovery was obtainable before the Judicature Acts. Here it is admitted that discovery would not have been obtainable before those Acts.

Order rescinded.

Solicitors for plaintiff: *Angell, Imbert Terry, & Page.*
Solicitors for defendant: *Clapham & Fitch.*

E. L.

[IN THE COURT OF APPEAL.]

1883
Feb. 28.

KEARSLEY *v.* PHILIPS AND ANOTHER.

Practice—Production of Documents—Joint Possession—Documents of Title.

In an action for the seizure of the goods of the plaintiff, which was justified by the defendant under an alleged power of distress in a mortgage deed, the defendant stated in his affidavit of documents that he and one B., who was not a party to the action, jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and the said B. as mortgagees, and that he the defendant objected to their production:—

Held, affirming the decision of the Queen's Bench Division, that such affidavit shewed sufficient reason for not making an order for inspection of the documents.

Murray v. *Walter* (Cr. & Ph. 114) followed.

APPEAL by the plaintiff from the decision of the Queen's Bench Division, refusing to order inspection of documents mentioned in the second schedule to the affidavit of the defendant Philips.

The action, which was for a seizure of the plaintiff's goods, was against two defendants, Philips and Ducane. These defendants were trustees of a sum lent on mortgage, and it was under a power of distress contained in the mortgage deed that the defendants justified the seizure of the goods. Since such seizure Ducane had retired from the trust, and one Blathwayt had been appointed trustee in his place. The defendant Philips made an affidavit of documents in which he stated that he and Blathwayt jointly had in their possession or power the documents mentioned in the second schedule to such affidavit, that such documents were the muniments of title of himself and the said Blathwayt to the mortgaged premises, and that he the defendant objected to produce these documents.

NORTH, J., at chambers refused an application by the plaintiff for an order for inspection of these documents, and the Queen's Bench Division dismissed an appeal from such decision of North, J. (ante, p. 36).

1883

KEARSLEY v. PHILIPS.

The plaintiff appealed.

Bigham, and *C. A. Russell*, for the plaintiff. The affidavit shews no sufficient reason for refusing inspection. It does not state, as it ought to have done, that Blathwayt has been applied to, and has refused to allow the production of the documents, or that the defendant Philips is unable to produce them: Seton on Decrees, 4th ed. 152; *Hutchinson* v. *Glover*. (1) The learned judge at chambers and the Divisional Court considered the case to be governed by *Murray* v. *Walter* (2), but this is an application under Order XXXI. rule 11, which gives a full discretionary power to the Court to order the production of documents, and it is not to be regulated by the old equity rules and decisions, but by the rules of the Judicature Act. In *Jones* v. *Monte Video Gas Co.* (3), Brett, L.J. says, "the proper practice as to the discovery of documents no longer depends upon the orders of the Court of Chancery or the Common Law Procedure Acts, or the custom or practice of the Common Law Courts. It depends upon the orders and rules of the Judicature Acts."

Smyly appeared for the defendants, but was not called on.

BRETT, L.J. I desire emphatically to declare that I never meant to say that we are not to look to the decisions of the Court of Chancery in a case like the present; on the contrary, I think that we are bound to do so in order to ascertain the principle on which we are to act, and that the rules and orders under the Judicature Act as to discovery and inspection apply only to the mode of procedure. Now the case of *Murray* v. *Walter* (2) shews that a party who applies to see documents which, as in the present case, are in the joint possession of the defendant and another person, has no right to do so, and that in order to establish that such party has not such right, the defendant who refuses to give inspection is not required to shew that he had endeavoured to obtain the consent of such other person to the inspection, because he is not bound to do so. That authority has been since acted on, and there has been nothing to overrule

(1) 1 Q. B. D. 138. (2) Cr. & Ph. 114.
(3) 5 Q. B. D. 556.

it, and in my opinion it is an answer to this appeal, which must therefore be dismissed.

COTTON, L.J. Order XXXI. rule 11, empowers the Court to order the production by any party to an action of such documents in his possession or power relating to any matter in question in the action as the Court shall think fit. We have therefore to consider whether the documents sought to be seen in this case are in the possession or power of the defendants. Now it was held in *Murray* v. *Walter* (1) that the right to the production and inspection of documents does not apply to documents which are not in the sole possession or power of the party to the suit who is called upon to produce them, but are only in his possession or power jointly with some other person who is not before the Court. That case has never been overruled, and it is an authority for its not being necessary that there should be an application to such other person who had the joint possession of the documents and his refusal to their production.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Englefield, for Storer & Lloyd.*

Solicitors for defendants: *Johnson & Weatheralls, for Wigglesworth & Rogerson.*

(1) Cr. & Ph. 114.

W. P.

1883
April 5.

THE MERSEY STEAMSHIP COMPANY *v.* SHUTTLEWORTH & Co.

Practice—Admission on Pleadings—Claim, Admission of—Counterclaim—Order XL. r. 11.

In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counterclaim for unliquidated damages to a greater amount.

The Court refused an application under Order XL. r. 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into Court to abide the result of the action.

ACTION for freight of goods.

By the statement of defence the defendants admitted that the sums claimed in the writ became and were due to the plaintiffs subject to the set-off and counterclaim thereinafter mentioned; and by way of set-off and counterclaim the defendants claimed damages exceeding the amount of the claim against the plaintiffs for breach of the terms of a contract to carry certain cargo on board a vessel of the plaintiffs from and to certain ports specified in such contract.

Gainsford Bruce, for the plaintiffs, moved under Order XL. r. 11, upon these pleadings for an order to sign judgment for the plaintiffs upon the claim, and that the amount thereof should be paid into Court by the defendants to abide the result of the action. He cited, as an authority to shew that the plaintiffs were entitled to this order, *Showell* v. *Bowron*. (1)

Hollams, for the defendants, was not called upon to shew cause.

WATKIN WILLIAMS, J. In this case I am clearly of opinion that the plaintiffs are not entitled to the order they claim. It is contended that they are so entitled by virtue of the provisions of Order XL. r. 11, on the ground that by reason of admissions on the pleadings it is shewn that there is no defence to the claim. It appears to me that it is an incorrect view of Order XL. r. 11 to suppose that it can be applied as suggested to a case like the present. If it were applicable, as a universal rule, in

(1) Weekly Notes (March 17, 1883), p. 50.

all cases where the claim is admitted, but there is a counterclaim for damages of equal or superior amount, it would, as it seems to me, take away in effect the right that is given by Order XIX. r. 3, which enables the defendant to set up by way of counterclaim against the claims of the plaintiff any right or claim, whether it sounds in damages or not. It appears to me, therefore, that the plaintiffs are not entitled to judgment as suggested. I wish, however, to guard myself against being supposed to arrive at the conclusion that there may not be cases in which the plaintiff may be entitled to judgment and such an order as is here prayed for, upon an admission of the claim, although there is a counterclaim, as, for instance, where the counterclaim is apparently frivolous or unsubstantial. It is unnecessary for us to determine the question whether that may be so, for no such case is here set up by the plaintiffs, and there are no special circumstances put forward as a reason for making the order. The case is put by the plaintiffs upon the broad ground that when the claim is admitted the plaintiff is at once entitled to judgment for the amount of it. I content myself by saying in answer that in my opinion that broad proposition is not well founded. I do not wish to be supposed to cast any doubt on the decision in the case of *Showell* v. *Bowron*. (1) It may well have been that there were circumstances in that case tending to lead the Court to the conclusion that the counterclaim was frivolous or set up solely for the purpose of delay. In that case it might be just to give judgment at once on the claim, and order payment of the amount into Court by way of security.

MATHEW, J. I am of the same opinion. The counsel for the plaintiffs was really driven to contend that on the true construction of Order XL. r. 11, the plaintiffs were entitled to judgment on the claim and execution, although he only asked for judgment and an order for payment into Court of the amount. I do not think that the effect of the order is as contended. I am disposed to think that what the order contemplated was a case such as often arises, more especially in the Chancery Division,

(1) Weekly Notes (March 17, 1883), p. 50.

1883

MERSEY STEAMSHIP COMPANY v. SHUTTLEWORTH.

where final redress in respect of some matter may be given upon admissions in the pleadings, although other matters may remain to be determined in the action. The plaintiffs, it seems to me, must contend, in order to bring themselves within the terms of the order, that they are entitled to so much money by the admission on the pleadings, and are entitled to final redress as to that, and to have it paid to them immediately; but I cannot think that any such thing was contemplated by the order. I do not think it can have been intended by this order to affect the working of the other provisions of the rules, by which a defendant is empowered to set up a counterclaim for unliquidated damages by way of defence to the plaintiff's claim. If the plaintiffs' contention were correct in the case of a counterclaim for unliquidated damages, I do not see why the same procedure should not apply in the case of a set-off, which cannot have been intended. With regard to the case of *Showell* v. *Bowron* (1), which was cited to us as an authority for the plaintiffs' contention, I assume that the Court proceeded in that case to make the order in the exercise of their discretion upon special grounds peculiar to that case. Of such special circumstances there is no suggestion in the present case.

Order refused.

Solicitors for plaintiffs: *Flux, Son, & Co.*
Solicitors for defendants: *Hollams, Son, & Coward.*

(1) Weekly Notes (March 17, 1883), p. 50.

E. L.

THE FORE STREET WAREHOUSE COMPANY, LIMITED *v.* DURRANT & Co.

1883
March 13.

Practice—Lunatic Defendant—Business carried on in name of Firm—Service on Manager—Order IX. rr. 5, 6, 6*a*—*Order XIII. r.* 1.

The defendant, who carried on business in the name of a firm apparently consisting of more than one person, was sued in her firm name; the writ was served at her place of business upon the manager according to Order IX. r. 6a; and judgment signed in default of appearance. At the time of the service of the writ she was of unsound mind and confined in an asylum, but this was unknown to the plaintiff:—

Held, that the judgment must be set aside, as the writ ought to have and had not been served under Order XIII. r. 1.

MOTION by way of appeal from an order of Hawkins, J., which rescinded an order of the Master, setting aside the judgment and all subsequent proceedings in this action.

It appeared that the defendant, Mary S. Durrant, carried on business in the name of Durrant & Co. The plaintiffs' solicitors wrote to her for a debt of 86*l.* 6*s.* 1*d.*, and in reply received a letter from Messrs. Saxelby & Faulkner, solicitors, stating that the letter had been brought to them by the manager of the firm; that the defendant was too ill to attend to business, and asking that the matter might stand over for a few days. On the 29th of December, 1882, the defendant's solicitors wrote again to inform the plaintiffs that the defendant was confined in a private lunatic asylum, and that they the solicitors would not accept service of process. On the 30th, but as they stated before receiving the letter of the 29th, the plaintiffs served the writ on the manager of the defendant's business under Order IX. (1), and afterwards signed judgment for non-appearance.

E. G. Man, for the defendant, was stopped.

(1) Order IX. r. 5: Where a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant.

Rule 6: Where partners are sued in the name of their firm, the writ

1883

FORE STREET WAREHOUSE COMPANY v. DURRANT.

R. V. Williams, for the plaintiffs. First, there is the preliminary objection that, no application having been made for a guardian to be appointed on behalf of the defendant under Order XIII. r. 1 (1), counsel cannot be heard as representing her. If the solicitors assuming to act for the defendant are really authorized to act for her, they ought to have entered an appearance. Secondly, the judgment ought to stand, for the writ was duly served. The fact that the defendant is a lunatic does not oust the operation of Order IX. r. 6. The sole question is, was the defendant's business carried on in the name of a firm? In the case of an ordinary trade debt it is more convenient in the interests of the defendant to serve the manager of the business instead of the keeper of a lunatic asylum.

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shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

Rule 6a: Where one person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

(1) Order XIII., r. 1. Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons.

Order XVIII., r. 1: In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committee or guardians appointed for that purpose.

1883

FORE STREET WAREHOUSE COMPANY v. DURRANT.

GROVE, J. I think the order of the Master was right, on the ground that the judgment had been obtained without proper service of the writ. The plaintiffs' solicitors wrote to the defendant, who carried on business in the name of Durrant & Co. In reply a letter is received by the plaintiffs' solicitors to the effect that the defendant is ill and unable to carry on business. On the 29th of December, the writ was issued and served according to Order IX. rule 6a at the defendant's place of business. On the 29th a letter was written by the defendant's solicitors saying that she was confined in a lunatic asylum, and I will accept the statement of the plaintiffs' solicitors that they only received the letter after the service of the writ. But had the writ been properly served? If the defendant had been a sane person the service would have been good. But she was insane at the time of service, and a letter stating the fact had been sent to the plaintiffs' solicitors the day before the service. If rule 6a of Order IX. stood by itself it might possibly be held to include insane persons. But rule 5 enacts that where a person of unsound mind not so found by inquisition is defendant, service on the committee or on the person under whose care he is shall, unless a judge otherwise orders, be deemed good service. Therefore where the defendant is in a lunatic asylum the proper service would be on the keeper of the asylum. It was argued that the rule was in its terms permissive and not obligatory. I was at first impressed by this argument, but Order XIII. r. 1 enacts that where no appearance has been entered by a person of unsound mind the plaintiff may apply for an order assigning a guardian to appear and defend the action, and no such order is to be made unless it appears that the writ was duly served and notice of the application for the order served upon or left at the house of the person with whom or under whose care the defendant was at the time of the service of the writ. I think the principle of this rule is that the service should be upon some person qualified to act for the lunatic or most likely to know to whom the fact of the service ought to be communicated. The manager of the lunatic's business might be ignorant of these matters. Where the writ is served in such a manner that it may probably never reach the lunatic, I do not think it can be a valid and proper service. The

1883

FORE STREET WAREHOUSE COMPANY v. DURRANT.

plaintiffs may reasonably be required to go through all the formalities which may give the friends of the lunatic a proper opportunity of appearing. It may, however, well be that if one only of several members of a firm is a lunatic service under Order IX. r. 6a is sufficient.

As for the objection that the solicitors are not qualified to appear for the lunatic, there is no doubt that they were authorized to act when she was first taken ill, and I think that the retainer would extend to enable them to take such steps as became necessary in consequence of her lunacy.

LOPES, J. I am of the same opinion. I think that the judgment ought to be set aside on the ground that there was no proper service of the writ. It is admitted that the defendant was a lunatic when the writ was issued, and although she carried on business as Durrant & Co. it was a mere name, as she had no partners. Under these circumstances, I think she was in the same position as if she had been sued in her individual capacity. If she had been sued in her individual capacity, Order IX. rule 5 applies, and service upon the person with whom she resides, or under whose care she is, is good service. If she had had other partners it may be that the service of the writ on the manager of the business under rule 6 would be good, but it is unnecessary to decide this question, for rule 6 cannot in any view apply to the facts before us.

Order rescinded.

Solicitors for plaintiffs: *Ashurst, Morris, & Crisp.*
Solicitors for defendant: *Saxelby & Faulkner.*

A. P. S.

MUNSTER *v.* RAILTON & Co.

1883
April 4.

Practice—Action against Partners in Name of Firm—Appearance by one Partner only—Judgment entered against Partner appearing instead of against Firm —Application to issue Execution against other Partner—Amendment of Judgment—Form of Issue—Order XII. r. 12; *Order XLII. r.* 8.

The plaintiff issued a writ against the firm of R. & Co. R. only appeared to the writ, and the plaintiff delivered statement of claim against "R. sued as R. & Co." Issue having been joined, the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R. sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it, in accordance with the writ, a judgment against the firm of R. & Co., and for an issue under Order XLII., r. 8, to determine the liability of C. :—

Held, that the amendment ought to be allowed, for the plaintiff, having acted in ignorance of the facts, was not concluded by the form of the proceedings subsequent to the writ, and that the issue must be granted not merely to determine whether C. was a member of the firm, but whether he was jointly liable with R. in the action.

Appeal from an order of Hawkins, J., in chambers, refusing to amend the judgment in this action which had been entered up by the plaintiff against "R. Railton sued as A. J. Railton & Co.," by making it in form a judgment against "A. J. Railton & Co."

It appeared that the action was for libel, and that the writ had been issued against the firm "A. J. Railton & Co." The only appearance was by one Richard Railton, and the plaintiff then delivered statement of claim against "Richard Railton sued as A. J. Railton & Co." Issue having been joined, the cause came on for trial, when a verdict was taken by consent for 40*s.* damages, and the plaintiff entered up judgment against "Richard Railton sued as A. J. Railton & Co." The plaintiff subsequently discovered that Cox had been a member of the firm, though there was contradictory evidence as to whether he had continued a member up to the date of the writ, and applied to have the judgment amended by entering it up against the firm "Railton & Co.," as a preliminary to an application under Order XLII. r. 8.

H. T. Atkinson, and *Coghill*, for the plaintiff. The plaintiff's application is a reasonable one, as he entered up judgment in

1883

MUNSTER v. RAILTON.

ignorance of the real facts. An issue can, if required by Cox, be directed under Order XLII. r. 8 for the purpose of determining his liability: *Ex parte Young.* (1)

Gore, in support of the order. Under the circumstances the plaintiff must be taken to have elected to proceed against Railton separately instead of the firm of Railton & Co., and there is no jurisdiction to amend the form of the judgment. The statement of claim and the subsequent proceedings are inconsistent with and supersede the writ. The nature of the cause of action is to be derived from the statement of claim in preference to the writ: *Johnson* v. *Palmer.* (2)

WATKIN WILLIAMS, J. I think the order of Hawkins, J., must be rescinded. The summons was primarily to amend the form of the judgment, and to enter it up in conformity with the language of the writ. Now the writ was issued against "A. J. Railton & Co." Richard Railton appeared to this writ, and the plaintiff thereupon sued him as sole defendant, and a little incautiously drew up his statement of claim as against "Richard Railton sued as A. J. Railton & Co." The action went down to trial. At the trial Cox appeared as the party interested in the defence, and a verdict for the plaintiff for 40*s.* damages was taken by consent and judgment signed against "Richard Railton sued as A. J. Railton & Co." The plaintiff then discovered for the first time that Cox was a partner in the firm which he had intended to sue, though there is some controversy as to whether Cox continued a partner up to the date of the writ. The result, therefore, is that the judgment was not entered up in conformity with the writ as according to the practice it ought to have been, and the plaintiff desires to proceed under Order XLII. r. 8, for the purpose of obtaining execution against Cox as being a member of the firm. For this purpose he first applies for leave to amend the form of judgment by making it a judgment against A. J. Railton & Co. It is objected on behalf of Cox that we have no jurisdiction to make this amendment. I cannot think there is anything in the objection, and the order for the amendment of the judgment must

(1) 19 Ch. D. 124, per Lord Selborne, C., at p. 133. (2) 4 C. P. D. 258.

1883

MUNSTER v. RAILTON.

be made. Then the plaintiff asks for an issue to determine whether Cox is liable upon this judgment. I think this application must also be granted, but the issue must be not merely whether Cox was a partner in the firm of A. J. Railton & Co., but whether he is liable jointly with Railton to the plaintiff in this action.

MATHEW, J. I am of the same opinion. I have no doubt we have power to amend the judgment as prayed. The writ was duly served; Cox ought to have entered an appearance to it, and as he has made no affidavit to the contrary, we may presume that he was well aware of the course taken by Railton in appearing in his own name. The mode in which the judgment was drawn up was a mere irregularity, which Cox has brought about by his own omission.

Then as to the form of the issue under Order XLII. r. 8, I agree that it should be whether Cox is liable as a member of the firm.

Order rescinded. (1)

Solicitor for plaintiff: *W. Brewer.*

Solicitors for defendant: *Palmer & Bull.*

A. P. S.

ASKEW AND ANOTHER *v.* LEWIS.

March 12.

Bill of Sale—Rectification of Register under Bills of Sale Act, 1878, *s.* 14—*Bill of Sale void at commencement of the Act—Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 14, 23.

A bill of sale, void for want of renewal of registration at the commencement of the Bills of Sale Act, 1878, cannot be renewed under s. 14 of that Act.

FURTHER CONSIDERATION.

The plaintiffs were trustees of a settlement made in 1869, and duly registered under the Bills of Sale Act, 1866, but not renewed within five years as required by s. 4 of that Act. After the passing of the Bills of Sale Act, 1878, the plaintiffs obtained an order under s. 14 for an extension of the time for renewal of registration, and they accordingly re-registered the bill of sale. Some of the goods comprised in the bill of sale were seized by the sheriff

(1) See *Davis* v. *Morris*, ante, p. 436.

1883

ASKEW v. LEWIS.

on behalf of the defendant as execution creditor, and this was an interpleader issue to try the right to these goods.

At the trial before Cave, J., on the 22nd of February, 1883, the jury were discharged, and the learned judge, after hearing arguments, reserved his judgment.

Bowen Rowlands, Q.C., and *L. C. Jackson*, for the plaintiffs.

Aspland, for the defendant.

Cur. adv. vult.

March 12. CAVE, J. Under the Bills of Sale Act, 1866, under which this bill of sale was executed, it was necessary by s. 4 that there should be a renewal of the registration once in every period of five years. This particular bill of sale was not so renewed, and at the time when the Bills of Sale Act, 1878, came into operation some time had elapsed since the period when in the ordinary course the bill of sale should have been renewed. By s. 14 of the Act of 1878, a judge, on being satisfied that the omission to register a bill of sale or an affidavit of renewal within the time prescribed by this Act was accidental or due to inadvertence, may, in his discretion, order such omission to be rectified by extending the time for such registration on such terms and conditions, if any, as to security—notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct. The question I have to decide is whether or not that section applies to a bill of sale executed but not renewed, as it should have been before the passing of the Act.

The material section is s. 23, which enacts, "From and after the commencement of this Act the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed, provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force." Now the effect of that section is that the Bills of Sale Act, 1878, is not to apply unless this is one of the cases falling within the exception, that is unless it is a matter expressly mentioned in the Act with respect to construction or with respect to renewal of registration.

Sect. 7 of the Act provides that fixtures or growing crops are not to be deemed separately assigned when the land passes by the same instrument, and contains these words: "The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act and then subsisting and in force." This is an express mention of a matter of construction, and the other exception, that of renewal of registration is dealt with by s. 11, which enacts that "The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least in every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void." Here, as in the former case, there is express mention of bills of sale executed before the commencement of the Act.

Now it is said, and I think correctly, that s. 14 applies to the renewal of a bill of sale, and the question is whether it contains an express mention of bills of sale in force previous to the coming into operation of the Act of 1878. There is certainly no express mention of bills of sale executed before the commencement of the Act, and the words "the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act" certainly point to bills of sale which are either executed after the passing of the Act or which, if they were executed before, do not require to be renewed until after. Not finding any express mention in this section of a bill of sale which has been executed before the commencement of the Act, and which should have been but has not been re-registered before that time, I conclude that s. 14 does not apply to such a case as the present.

It follows, if I am right, that as this bill of sale was void before the commencement of the Act of 1878, and could not be re-registered under that Act, my judgment must be in favour of the execution creditor.

Judgment for the defendant.

Solicitor for plaintiffs: *R. B. Horman Fisher.*
Solicitors for defendant: *Woodard & Hood.*

1883
March 12.

THE GUARDIANS OF THE POOR OF THE UNION OF AMESBURY *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF WILTS.

Highway—Main Roads—Maintenance—Expense of removing Snow—Liability of County Authority—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

The main roads within the district of a highway authority became impassable from snow, which the highway authority removed, and they claimed one-half the expense of doing so from the county authority under the Highways and Locomotives Amendment Act, 1878, s. 13 :—

Held, that this was an "expense incurred in the maintenance" of such roads within that section, and that the county authority were liable.

Special Case.

Under the Public Health Act, 1875, the Poor Law Union of Amesbury, in the county of Wilts, is a rural sanitary district, of which the guardians are the rural sanitary authority. The district was at the time of the passing of the Highways and Locomotives (Amendment) Act, 1878 (hereinafter called "the Act of 1878"), coincident in area with the Amesbury Highway District duly constituted under the Highways Act, 1862, and by virtue of an order made by the county authority of Wilts under ss. 4 and 5 of the Act of 1878 the Amesbury rural sanitary authority became entitled to exercise all the powers of a highway board within their district. Sect. 13 of the Act of 1878 enacts as follows: "For the purposes of this Act and subject to its provisions any road which has, within the period between the 31st day of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road ; and one half of the expenses incurred from and after the 29th day of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county autho-

rity may appoint, to the effect that such main road has been maintained to his or their satisfaction: Provided that no part of such expenses shall be included in (1) any precept or warrant for the levying or collection of county rate within the metropolis, subject and without prejudice to any provision to be hereafter made; or (2) any order made on the council of any borough having a separate court of quarter sessions under s. 117 of the Municipal Corporation Act, 1835. The term 'expenses' in this section shall mean the cost of repairs defrayed out of current rates, and shall not include any repayment of principal moneys borrowed, or of interest payable thereon."

In or about the month of January, 1881, certain main roads in the district of the Amesbury rural sanitary authority were, in common with most of the highways in the county of Wilts, rendered impassable by a severe fall of snow. The rural sanitary authority immediately took measures to move the snow and reopen the roads for traffic. The expenses incurred by them in so doing amounted to 150*l.* 8*s.* 9*d.*, which was admitted to have been necessarily incurred in such a removal of snow as was required to render the roads fit for traffic. The expenditure was entered in the surveyor's cash book under the heads of 'manual and steam labour, repairs to main roads,' and was included in the account of the expenses of the maintenance of main roads kept by the rural sanitary authority pursuant to s. 18 of the Act of 1878. This account was duly audited by the Local Government Board district auditor. The county authority did not attend the audit or appeal against or take any steps to question the validity of the certificate of the auditor, but they refused to pay one-half of the above-named sum on the ground that it was not an expense incurred in the maintenance of main roads under s. 13 of the Act of 1878.

The county surveyor duly certified that the main roads had been maintained to his satisfaction. The question for the opinion of the Court was whether the defendants were liable to pay the plaintiffs one half of the above-mentioned sum of 150*l.* 8*s.* 9*d.*, as being properly included by the plaintiffs as rural sanitary authority in the account of expenses incurred by them in the maintenance of main roads within their district.

1883

GUARDIANS OF AMESBURY v. JUSTICES OF WILTS.

A. Charles, Q.C. (*G. A. R. Fitzgerald*, with him), for the plaintiffs. This is an expense incurred in the maintenance of the roads just as much as if it had been incurred to replace a portion of the road which had been carried away, or to remove any obstruction, such as a rock or a tree. The snow rendered the roads impassable, and if it had been left on them the roads could not have been said to be maintained, that is, kept in a state in which they could be used as usual.

Sir F. Herschell, S.G. (*Ravenhill*, with him), for the defendants. By the proviso, expenses are to mean cost of repairs. If what is now sought to be recovered was a cost of repair, the road was out of repair, and an indictment would lie, but the parish could hardly be indicted for not removing snow, which if left to itself would disappear in time.

It cannot be contended that every expense a surveyor might be put to in respect of a road, impounding cattle for instance, would be included in the term "cost of repair." The removing of snow is provided for by s. 26 of 5 & 6 Wm. 4, c. 50, and the snow was removed under that provision and not as a matter of maintenance.

A. Charles, Q.C., in reply. The proviso as to cost of repair is directed to a different point, namely, the distinction between provision for current expenses and the repayment of principal sums. This is a repair necessary to render the road fit for traffic. As to an indictment lying for nonrepair in such case, the mere fact that the snow in time would disappear would not prevent such an indictment from being brought, and *Reg* v. *Inhabitants of Greenhow* (1) shews that an indictment will lie where a road is partly destroyed and partly covered by a landslip.

CAVE, J. In this case I am of opinion that the plaintiffs are entitled to judgment. The case of *Reg.* v. *Inhabitants of Greenhow* (1) decides that where a road becomes impassable by reason of material coming on to it the parish is not relieved from liability to repair it. In such a case neglect of that duty would subject the parish to liability to an indictment, and the expense of moving the material which is on the road is an expense incurred in repairs. The only difference that I can see between that and

(1) 1 Q. B. D. 703.

the present case is that there the obstruction was of a permanent nature, while in this it was temporary; but I do not think that a sufficient distinction to render the rule inapplicable to the present case. In respect of either a permanent or a temporary obstruction the public have a right to have the road made fit for use, and the authorities are bound to do what is necessary. In the case of snow lying on a highway it is improbable that an indictment would be brought, because in general it would be a temporary interruption, but that is a matter of degree, and does not affect the principle we have to apply to this case.

DAY, J., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Taylor, Hoare, & Taylor for Wilson & Sons, Salisbury.*

Solicitors for defendants: *Merriman, Pike, & Merriman, for R. W. Merriman, Marlborough.*

A. M.

TIPPETT, APPELLANT; HART, RESPONDENT.

March 9.

Inland Revenue—Beer—Brewer other than a Brewer for Sale—Exemption from Duty—Annual Value of House occupied not exceeding 10*l.—Inland Revenue Act*, 1880 (43 & 44 *Vict. c.* 20), *s.* 33, *sub-s.* 3.

By the Inland Revenue Act, 1880, s. 33, sub-s. 3, if the annual value of the house occupied by a brewer other than a brewer for sale does not exceed 10*l.*, the beer brewed by him shall not be charged with duty. The respondent brewed beer (not for sale) in a house occupied by him of an annual value not exceeding £10, and he occupied, as a residence, another house which was of greater annual value than £10:—

Held, that the exemption from duty did not apply to the beer so brewed.

CASE stated by justices.

1. Upon the hearing of an information preferred by the appellant against the respondent under s. 32, sub-s. 1 of the Inland Revenue Act, 1880, that the respondent being a brewer of beer other than a brewer of beer for sale and chargeable to the duty on beer under the Inland Revenue Act, 1880, used three bushels of malt in the brewing of beer without making such entry in the paper duly delivered to the respondent as such brewer for the

1883

TIPPETT v. HART.

purpose as by the said Act was and is required to be made, whereby he incurred a fine of 10*l.*, the justices dismissed the information.

2. The following facts were admitted:

3. The appellant was an officer of Inland Revenue resident in Ipswich, in Suffolk.

4. The respondent was a farmer and occupier of two distinct houses or holdings respectively known by the names of "Bourne Hall Farm" and "Stalls Valley Farm," both situate in the parish of Wherstead, in Suffolk, and about two miles apart.

5. The annual value of the house at Bourne Hall Farm, occupied by the respondent, and in which he lived, was 20*l.*

6. The annual value of the house at Stalls Valley Farm occupied by the respondent, and in part of which Robert Grimwood, his son-in-law, lived as his bailiff, did not exceed 10*l.*

7. The respondent had, as the occupier of the house belonging to Bourne Hall Farm, for two years previously taken out a licence as a brewer other than a brewer for sale, and the appellant, in pursuance of s. 32 of the Inland Revenue Act, 1880, duly delivered a brewing paper in the prescribed form to the respondent as the occupier of such house, and the respondent, in pursuance of sub-s. 1 of the said section, duly entered in such brewing paper the quantity of malt, corn, and sugar which he intended to use in respect of the brewing there, and he paid the duty on the materials so entered.

8. The respondent had as the occupier of the house belonging to Stalls Valley Farm for two years previously taken out a licence as a brewer other than a brewer for sale, and the appellant, pursuant to s. 32 of the Inland Revenue Act, 1880, duly delivered a brewing paper in the prescribed form to the respondent as the occupier of such house.

9. The respondent brewed beer at the house belonging to Stalls Valley Farm only for his own domestic use or for consumption by farm labourers employed by him in the actual course of their labour or employment, and on the 27th of September, 1882, used three bushels of malt in brewing such beer without making or having made before commencing to brew, or at any other time, any such entry in the brewing paper as aforesaid.

10. On the part of the appellant it was contended that the

respondent having brewed beer at the house at Stalls Valley Farm while occupier of the house at Bourne Hall Farm was chargeable to the duty on beer brewed at Stalls Valley Farm under the Inland Revenue Act, 1880, or, in other words, that the occupier of a house of the annual value of 20*l.* was ipso facto prohibited from brewing upon premises the annual value of which did not exceed 10*l.* without paying the duty, although those premises would by themselves have entitled him to exemption.

11. On the part of the respondent it was contended that as the house at Stalls Valley Farm did not exceed the annual value of 10*l.* he was only liable to pay for the licence to brew, and not to pay beer duty; that there were no express words constituting this offence, and that the respondent acted bonâ fide, and was strictly within the law, and he relied upon sub-s. 3 of s. 33 of the said Inland Revenue Act, 1880.

12. The justices decided in favour of the respondent. It was not suggested that the respondent had any fraudulent intention, or that he acted otherwise than in the honest belief that he was within the law.

The question for the opinion of the Court was, whether the respondent being the occupier of a house of the annual value of 20*l.* and also the occupier of another house of less annual value than 10*l.*, both which occupations were separate and distinct, and being a brewer other than a brewer for sale at both those occupations, was chargeable to the duty on the beer brewed by him at the house the annual value of which did not exceed 10*l.*

The Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), enacts as follows:—

"Sect. 32. A paper in the prescribed form shall be delivered by an officer to every brewer, other than a brewer for sale, if chargeable to the duty on beer under this Act, and the following provisions shall have effect in relation to the paper and the entries to be made therein:—

"(1.) The brewer shall, before commencing to brew, enter in the paper the quantity of malt, corn, and sugar which he intends to use in the brewing;

"(2.) The brewer shall, on demand by an officer, produce the

1883

TIPPETT v. HART.

paper for his inspection, and shall not cancel, obliterate, or alter any entry in the paper, or make any entry which is untrue in any particular."

"For any contravention of this section the brewer shall incur a fine of 10*l.*"

Sect. 33. "(1.) The commissioners may, when they think fit, require a brewer, other than a brewer for sale, to verify the entries on the paper delivered to him by a declaration to be made by him before a justice of the peace or an authorized officer.

"(2.) The charge of duty shall be made, and the duty shall be paid, at such times as the commissioners shall appoint.

"(3.) Provided that if the annual value of the house occupied by the brewer does not exceed 10*l.* the beer brewed by him shall not be charged with duty."

Sect. 34. "(1.) A brewer other than a brewer for sale shall only brew beer for his own domestic use, or for consumption by farm labourers employed by him in the actual course of their labour or employment.

"(2.) The brewer shall only brew on premises occupied by him, or in case the brewer occupies a house of an annual value not exceeding 10*l.*, on premises gratuitously lent to him by a brewer other than a brewer for sale.

"(3.) If the brewer contravenes either of the foregoing provisions of this section, or sells, or offers for sale, any beer brewed by him, he shall incur the penalty of 10*l.*" (1)

A. L. Smith, for the appellant. The exemption contained in the proviso is personal, and intended to be in favour of occupiers of tenements of small value who brew for their own use. According to the respondent's argument the occupier of a large estate could avoid the duty by brewing in a cottage on it. Sect. 34, which provides for brewing on premises gratuitously lent "in case the brewer occupies a house of an annual value not exceeding ten pounds," shews that the question is a personal one.

Grafton, for the respondent. The respondent comes within the words of the statute, for by sect. 34 he can only brew on premises

(1) Amended by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 15.

occupied by him, and by sect. 33 he is exempt if the annual value of the house occupied by him does not exceed ten pounds; that is, the house or premises where he brews. The liability and exemption apply, therefore, to the house where the brewing takes place and are not personal. This is a penal statute, and must be construed strictly, and it is found that the respondent had no fraudulent intention, and he ought not to be convicted: *Dickinson* v. *Fletcher*. (1)

POLLOCK, B. The question raised for the opinion of the Court is whether the order of justices was properly made dismissing an information against the respondent under s. 32, sub-s. 1 of the Inland Revenue Act, 1880. The point shortly stated is, whether the respondent, being a brewer other than a brewer for sale, and the occupier of a house of the annual value of 20*l.* and also the occupier of another house of an annual value not exceeding 10*l.*, such occupations being separate and distinct, is chargeable to the duty on the beer brewed by him at the last-mentioned house. This depends on the true construction of s. 33, sub-s. 3, of the Act, which exempts from duty the beer brewed "if the annual value of the house occupied by the brewer does not exceed ten pounds." It is contended for the respondent that this means the house occupied for the purpose of brewing. I cannot agree with this argument. It seems to me that what the Act intended was to get at the status of the person brewing. If he occupied a tenement of so small a value as 10*l.* a year or under, he was not to be called on to pay duty. When, however, it appears that the brewer occupies a house of higher value it is immaterial whether the beer is brewed in the house of greater value or in some smaller house occupied by him. In such case the statute did not intend to confer any exemption. The magistrate's question must be answered that their order was not properly made, and the case must be remitted to them.

HUDDLESTONE, B. I have some doubt as to what our decision should be, but not sufficient to justify me in dissenting. I cannot

(1) 43 L. J. (M.C.) 25.

1883

TIPPETT v. HART.

help thinking that there is force in the argument that the brewer can only brew in premises occupied by him, and that the exemption is of "the house" occupied by him. But for the difficulty pointed out that in that view of the case the proprietor of a large property might escape the duty by brewing in a small house, I should have been disposed to consider the respondent right.

NORTH, J. I agree that our judgment should be for the appellant. It is suggested that we must read the exemption in s. 33 as if it ran, "Provided that if the annual value of the house occupied by the brewer and in which he brews does not exceed ten pounds." I do not think this can be done, because s. 34, sub-s. 2, applies to a brewer brewing in premises lent to him whatever their value, and permits such a loan where the brewer occupies a house of an annual value not exceeding 10*l.*, shewing that the status of the person brewing was what was contemplated.

Case remitted; judgment for the appellant.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitor for respondent: *J. Mills, Ipswich.*

A. M.

March 20.

THE ATTORNEY GENERAL *v.* HUBBUCK AND OTHERS.

Probate Duty—Realty forming Part of Partnership Assets—Conversion.

The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty.

Custance v. *Bradshaw* (4 Hare, 315) discussed.

INFORMATION by the Attorney General to recover probate duty in respect of a sum of 22,150*l.*, which was alleged by such information to have formed part of the personal estate of William Augustus Hubbuck, deceased, and which, having been bequeathed

by his will to his widow, Eliza Matilda Hubbuck, since deceased, was also alleged to have formed part of the personal estate of the said Eliza Matilda Hubbuck.

The facts stated in the information and answers, so far as they appear to be material to this report, were as follows:—

In 1849 Thomas Hubbuck, Edward Martin Hubbuck, one of the defendants, and William Augustus Hubbuck, the testator, entered into partnership for a term of twenty-one years as oil and colour merchants. By the terms of the partnership, if any of the partners died before the expiration of the term of the partnership, provision was made for the purchase of his share at a valuation by the surviving partners, and it was also provided, if any of the partners retired, which he might do on giving certain notice, the remaining partners might take to his share at a valuation. Thomas Hubbuck, on behalf of himself and his said partners, and out of the partnership moneys, purchased the fee in various hereditaments and premises, all of which were thenceforward used for the partnership purposes.

After the expiration of the original term of the partnership no new agreement was made, but the partnership continued on the same terms as before.

In 1872 Thomas Hubbuck retired from the partnership, and, by an agreement of dissolution then made between the partners, it was agreed that the partnership should be dissolved as regards the said Thomas Hubbuck, he receiving a certain sum for his share. Edward Martin Hubbuck and William Augustus Hubbuck, who were brothers, continued to carry on the business, but no fresh agreement of partnership was executed. The defendants in their answer alleged that the partnership, subsequent to the retirement of Thomas Hubbuck, was a new partnership, to which the stipulations of the original deed were not applied, and that such new partnership was at will, and the only terms of it were that the partners were entitled to the profits of the partnership business in equal shares. They further stated that the money capital of the partners was not exactly equal, but the partners were always considered as entitled to the business premises of the partnership in equal shares. After his retirement Thomas Hubbuck conveyed the premises so purchased as aforesaid to

1883

ATTORNEY GENERAL v. HUBBUCK.

Edward Martin Hubbuck and William Augustus Hubbuck, and in all the conveyances of such premises was inserted a declaration that the premises conveyed were then, and should be, held by them as partnership property.

In January, 1878, William Augustus Hubbuck made his will, and thereby appointed his wife and Edward Martin Hubbuck and Frederick Furze, two of the defendants, executors thereof. He thereby directed that his share of capital in the business should, at the discretion of his executors, be allowed to remain in the business in the hands of his brother at 5 per cent. per annum interest, payable half yearly, for seven years next after his decease, or for such other period as his said brother and his other executors might agree upon. And the testator declared that his share of the freehold premises in which the said business was carried on, instead of being taken to at a valuation by his said brother as surviving partner, or of being sold, should be leased to his brother or other firm at a yearly rent equal to 5 per cent. per annum on the value of such premises as stated in the stock-taking account last signed prior to his decease, and for such term or terms as his said executors and his said brother or other firm should mutually agree upon. The testator also authorized his executors to sell to his said brother, as surviving partner, his share of the capital, stock, and effects of the business at the time of his decease, and his share of the said freehold premises, or any or either of them, for his share of their value according to the valuation at the last stock-taking prior to his decease; and subject to the foregoing directions the testator devised and bequeathed all his real estate, and the residue of his personal estate, unto his executors, their heirs, executors, administrators, and assigns, upon trust either to continue the same or any part thereof in the existing investments, or to sell and convert the same into money, and after payment of debts, funeral and testamentary expenses, and legacies, to invest the proceeds upon securities as therein mentioned, and out of the resulting income to pay an annuity of 1000*l.* to his wife during her life for the use of herself and the maintenance, education, and benefit of his child or children for the time being under the age of twenty-one years, or (being daughters) unmarried; and subject thereto his said

trustees were to hold his said residuary estate upon trust for his said wife absolutely.

William Augustus Hubbuck died on the 9th of March, 1878, without having revoked or altered his said will, and his said will was proved on the 15th of April, 1878. The sum at which the estate was sworn did not include the value of the testator's interest in the premises before mentioned as forming part of the partnership property.

After the death of William Augustus Hubbuck, the defendant Edward Martin Hubbuck continued to carry on the said business, and he paid to the executors of William Augustus Hubbuck, in respect of the share and interest lately belonging to the said William Augustus Hubbuck in the said premises, an annual sum calculated at 5 per cent. upon the amount at which the premises were valued at the last stock-taking before the death of William Augustus Hubbuck; but the defendant Edward Martin Hubbuck did not take any lease thereof from the executors of the said William Augustus Hubbuck, nor was any other arrangement made between them as to the said premises.

Eliza Matilda Hubbuck died on the 5th of May, 1880, having duly made her will, and thereby appointed the defendant Edward Martin Hubbuck and her sons the defendants William Hubbuck and Augustus George Hubbuck her executors, and she thereby confirmed, and directed her executors to do all acts which might be necessary to confirm, the options, powers, and provisions given by or contained in the will of William Augustus Hubbuck with respect to the freehold premises in which he was interested in partnership with his brother, and also with regard to his share of capital in the said partnership business, if any should be remaining at her decease. And subject thereto she gave the share of her said late husband in the said freehold premises unto and equally between and amongst all her children as tenants in common, and, in case during her lifetime her interest or the interest of her late husband in any part of the said freehold premises should be purchased by her said brother-in-law or by any other person, then a sum equal to the purchase-money paid or payable to her or to her late husband's estate was to be divided equally amongst her children; and the testatrix gave the residue

1883

ATTORNEY GENERAL v. HUBBUCK.

of her real and personal estate to the defendants William Hubbuck and Augustus George Hubbuck absolutely.

The will of Eliza Matilda Hubbuck was proved on the 21st of May, 1880, but no probate duty was paid upon the value of her interest in the proceeds of sale of the premises before mentioned. After the death of Eliza Matilda Hubbuck the defendant Edward Martin Hubbuck purchased the share and interest of the said William Augustus Hubbuck in the real estate belonging to the late partnership, and, accordingly, by divers conveyances, the defendants Edward Martin Hubbuck and Frederick Furze, as executors and trustees of the will of William Augustus Hubbuck, conveyed the said premises to certain uses under which the defendant Edward Martin Hubbuck became entitled in fee simple to the said premises.

The purchase-money paid upon such purchases amounted to 22,150*l.*, and no probate duty had been paid thereon.

The Commissioners of Inland Revenue claimed probate duty on that sum in the case of both the will of William Augustus Hubbuck and the will of Eliza Matilda Hubbuck, and the defendants denied that such duty was payable.

The defendants, by their answer, stated that, until William Augustus Hubbuck made his will, there had been no stipulations between him and his brother Edward Martin Hubbuck as to the right of the survivor in the partnership business; and the said Edward Martin Hubbuck and William Augustus Hubbuck were both of opinion that, in the event of the death of the said William Augustus Hubbuck intestate, his share in the real property belonging to the partnership would pass to his eldest son as heir-at-law; and, as the said William Augustus Hubbuck was at the time very ill, the matter was discussed between the said brothers, who were both desirous of avoiding such a result; and it was agreed between them that provisions to the contrary should be made by the will of William Augustus Hubbuck, and the provisions actually contained in the said will were so inserted according to an agreement in that behalf made by the said brothers; and the defendants contended that the duty was not payable, on the ground that the real estate belonging to the partnership was not personal assets, having regard to the express agreement

between the brothers, and certainly not personal assets for fiscal purposes.

In a further answer to the information as amended the defendants alleged that the agreement referred to in their answer was an agreement that the said William Augustus Hubbuck should be at liberty to and should make such provisions with respect to his share in the freehold premises as were embodied in his will; and they admitted that, except as appearing by the will itself and certain drafts made previously to the execution thereof, they could not state the terms of the agreement. It appeared from such further answer that the first draft of the will was prepared by the testator's solicitor in pursuance of general instructions given to him by Edward Martin Hubbuck; that the draft so prepared had been submitted and read over to the testator by Edward Martin Hubbuck; that various alterations at different times were made in the original draft, and that the terms of those and of the will as eventually executed were discussed and arranged between the testator and the said Edward Martin Hubbuck. The further answer entered into details of fact with regard to the various alterations so made which it seems unnecessary for the purposes of this report to set out.

March 17. *Sir F. Herschell, S.G.*, and *Vaughan Hawkins*, for the Crown. It is contended that this realty being originally partnership property the share of each partner in it was primâ facie personalty, and on his death would form part of his personal estate, and would therefore be liable to probate duty. It is for the defendants to shew that something has occurred to make it realty. It appears to be alleged that, by reason of something that took place prior to and in connection with the making of the will of William Augustus Hubbuck, there was an agreement by which the interests of the partners were reconverted into realty. But on the contrary it is expressly stated that the partners erroneously supposed such interests to be realty already, and the provision of the will was made to prevent the consequences that would have followed if this had been the case. There is nothing to indicate an intention that the property should be treated as realty, but the reverse. Furthermore, there was nothing to con-

1883

ATTORNEY GENERAL v. HUBBUCK.

stitute a binding agreement between the two partners. The case of *Custance* v. *Bradshaw* (1) will be relied on by the defendants. But that decision can only be supported on the peculiar circumstances of the case, and on the ground that there never was any conversion of the property into personalty; that it never was partnership property at all, though owned by partners. The proposition contained in the marginal note to the case is clearly not law: see *Attorney-General* v. *Brunning* (2); *Forbes* v. *Steven.* (3) It is clear that Eliza Matilda Hubbuck the widow took the property as forming part of her husband's share in the partnership assets, and as she took it so she transmitted it by her will. Therefore if the duty is payable in the case of the one will it is payable in the case of the other.

March 20. *Grantham, Q.C.*, and *Maidlow*, for the defendants. The rule of equity, by which realty forming part of partnership property is to be considered as personalty, is not applicable to a case like the present. It is true that as a general rule, having regard to the ordinary incidents of a case of partnership, a conversion of such realty into personalty is considered as taking place and the interest of the deceased partner's estate in such realty is held to consist of a share in the proceeds of such conversion. But this rule is not universal; in some cases a conversion may not in fact ultimately become necessary for the purpose of arranging the rights of the parties; in such cases there is nothing to prevent the actual state of the property, as events have turned out, being looked to to determine the question whether duty is payable to the Crown. There is no ground for saying that the state of things at the time of the death can alone be looked to: it is contended that the actual event may be looked to on the question whether there is a conversion or not, and the Crown is not entitled to probate duty on realty if in the event it becomes unnecessary to convert it into personalty, and the conduct of the parties shews that they intended it to remain realty and be treated as such; and if the probate duty had been already paid, upon the event shewing that there was no conversion, the duty would be returned.

(1) 4 Hare, 315. (2) 8 H. L. C. 243.
(3) Law Rep. 10 Eq. 178.

It is decided by many cases that where there is a trust for sale of real property and the conversion has become unnecessary, because the trusts of the proceeds of sale have failed or become exhausted, the property is not, after such events, to be considered as converted, but retains in contemplation of equity its actual character as realty, and will go to the heir: *Smith* v. *Claxton* (1); *Curteis* v. *Wormald* (2); *Ackroyd* v. *Smithson* (3); *Cogan* v. *Stephens.* (4) The case of *Custance* v. *Bradshaw* (5) is distinctly in point, and is not affected, so far as it applies to this case, by *Attorney-General* v. *Brunning* (6) and *Forbes* v. *Steven.* (7) The reason, on which the decision in *Attorney-General* v. *Brunning* (6) is founded, is that in that case the contract of sale made by the testator had after his death been actually completed, and the proceeds of the sale received. So also in *Forbes* v. *Steven* (7) it appears that there actually had been a sale and conversion of the property.

Secondly. It is clear that the general rule does not apply where there is an agreement, either express, or which may be implied from the circumstances and conduct of the parties, that the property shall remain realty and not be treated as converted. Lindley on Partnership, 4th ed. 670–672. It is contended that there is clear evidence here of such an agreement from the provisions of the will of William Augustus Hubbuck, and the circumstances connected with the making of such will. The provision in the will was made by arrangement between the two partners on the assumption that the property was realty and would go to the heir of William Augustus if no such provision was made, and the provision made is that it may be leased to the surviving partner, which is inconsistent with the idea that it is to be considered as converted into personalty at the date of the death. It is submitted that after such an arrangement neither the executors of the deceased partner, nor the surviving partner, could have insisted upon a conversion of the realty immediately upon the death. It is intended to remain in specie and be leased as such.

It does not follow because Eliza Matilda Hubbuck took the

(1) 11 Madd. 484.
(2) 10 Ch. D. 172.
(3) 1 Bro. C. C. 503.
(4) 5 L. J. (Ch.) 17.
(5) 4 Hare, 315.
(6) 8 H. L. C. 243.
(7) Law Rep. 10 Eq. 178.

1883

ATTORNEY GENERAL v. HUBBUCK.

interest as personalty that she transmitted it as personalty. Here, again, it is contended that the actual state of the property as she enjoyed it must be looked to. It was in fact treated as realty and leased to the continuing partner.

[They cited also *Attorney-General* v. *Lomas* (1); *Rowley* v. *Adams* (2); *Re De Lancey's Succession* (3); *Matson* v. *Swift* (4); *Steward* v. *Blakeway* (5); *Taylor* v. *Haygarth* (6); *Lysaght* v. *Edwards* (7); *Mordaunt* v. *Benwell* (8); *Walker* v. *Denne.* (9)]

The Solicitor-General was not called upon to reply.

POLLOCK, B. This is an information filed by the Attorney-General for the recovery of probate duty in respect of a sum of 22,150*l.* as part of the personal estate of William Augustus Hubbuck. The duty is claimed in respect of property acquired under his will, and also of the same property acquired under the will of his widow, Eliza Matilda. The question is whether such duty is payable in respect of this property, it being alleged on the part of the Crown that it must be treated as personal estate, whereas it is alleged on the part of the defendants that it must be treated as real estate in respect of which no probate duty would be payable. Now it may be well in the first place to observe that the contention of the Crown is founded upon the fact of this being partnership property, because many cases have been cited to us bearing on the general question, which has sometimes had to be considered, whether there has been a conversion or not in cases other than cases of partnership. In those cases it may be that the true rule is that you must look to what actually took place in order to see whether there has been a conversion. That rule is well expressed by Kelly, C.B., in *Attorney-General* v. *Lomas.* (10) He there says in giving judgment: "If the land remains unconverted at the time when the heir who takes an undisposed of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land and

(1) Law Rep. 9 Ex. 29.
(2) 7 Beav. 548.
(3) Law Rep. 5 Ex. 102, 105.
(4) 8 Beav. 368.
(5) Law Rep. 6 Eq. 479; 4 Ch. 603.
(6) 14 Sim. 8.
(7) 2 Ch. D. 499.
(8) 19 Ch. D. 302.
(9) 2 Ves. (Jun.) 170, 185.
(10) Law Rep. 9 Ex. 29, 34.

devolves according to the rules governing the descent of real estate." He goes on to say that, where there is an absolute obligation to sell, it is otherwise. I do not think it necessary to refer further to that case, and many other cases that have been cited, because they are cases where the rule, upon which the contention of the Crown in this case has been put, in no way applies. The contention of the Crown is that this is a case of partnership and of partnership property, and if the property be not partnership property, cadit questio. On that point again we were referred to a great many cases upon the part of the defendants, in which it was shewn that real estate might be owned by partners, and the property might be so dealt with as upon the death of a partner to lead to the conclusion that there was no conversion; but those cases when referred to will be found to be cases in which, though the partners were possessed of the property, the property was not partnership property. Such cases arise with regard to many sorts of property, as, for instance, in the case of ships, which are often owned by partners as co-owners, but which are not part of the assets of the partnership. The most prominent case of that sort to which we were referred was *Steward* v. *Blakeway*. (1) In that case there was a quarry upon land of which the partners were co-owners, which was worked by them for the purposes of trade; but the quarry was not partnership property, and therefore the rule which is insisted on in the present case was not applicable. Now, the property in question in this case being, as it seems to me, undoubtedly partnership property, let us see how the law has been laid down with regard to such property by the decisions, not merely in one, but in very many cases. For the purpose of my decision in this case, I will refer by way of instance to the decision of Kindersley, V.C., in one of the earlier cases, viz., *Darby* v. *Darby* (2), which was cited and approved of by James, L.J., in *Forbes* v. *Steven*. (3) The rule is there laid down generally in these terms: "Now it appears to me that, irrespective of authority and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it

(1) Law Rep. 6 Eq. 479; Law Rep. 4 Ch. 603.

(2) 3 Drew. 495.

(3) Law Rep. 10 Eq. 178.

1883

ATTORNEY GENERAL v. HUBBUCK.

Pollock, B.

out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question; and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he should retain his own share of it in specie." Now that is a rule which has been acted upon again and again, and it clearly follows that in the case of a partnership it is not necessary to look further on to see what may or may not have been the case with regard to the particular dealing with the property. The question is what is the status of the property during the existence of the partnership. There could not, as it appears to me, be a clearer case of partnership property than the present. The property was purchased out of the partnership assets. Upon the retirement of Thomas Hubbuck, he receives from the remaining partners a certain sum for his share of the partnership effects, including his share of the freehold premises purchased or held by the partnership. On the conveyances by him to the remaining partners, it is expressly declared that these premises were and should be held by them as partnership property. Then, when William Augustus Hubbuck makes his will, he deals with the property, as it seems to me, as partnership property. He declares that his share of the freehold premises, in which the said business was carried on, instead of being at once taken at a valuation by his brother as surviving partner, may be leased to his brother or other firm at a yearly rent equal to 5 per cent. per annum. He also authorizes his executors to sell to his brother, as surviving partner, his share of the capital, stock, and effects of the partnership, and also his share of the said freehold premises for his share of the sum at which the same might have been valued at the last stock-taking prior to his decease. After that

1883

ATTORNEY GENERAL v. HUBBUCK.

Pollock, B.

he devises and bequeaths all his real estate, and the residue of his personal estate, to his executors upon certain trusts, and ultimately for the benefit of his wife absolutely. I cannot conceive of a case in which the property has been dealt with more completely on the footing of personal property. Before proceeding further I will deal with one authority which was cited. That is the case of *Custance* v. *Bradshaw*. (1) That case appears to have been commented upon as not going with the current of authorities on the subject, but I do not think it necessary to consider on the present occasion whether the decision in that case would now be partially upheld, viz., so far as concerns the view there taken as to the character of the property; for so far the case is not inconsistent, I think, with our decision; but, in so far as the decision sanctions a distinction between cases where the Crown is concerned and cases in which other parties are concerned, the decision is clearly overruled by the decision in *Attorney-General* v. *Brunning*. (2) Again, the decision in *Custance* v. *Bradshaw* (1) has been commented upon by Lindley, L.J., in many passages of his book on partnership, and the peculiar circumstances explained by reason of which it is distinguishable from such a case as the present. James, L.J., says in *Forbes* v. *Steven* (3): "The case before Sir James Wigram (viz. *Custance* v. *Bradshaw* (1)) was shewn in the same way not to have been a case of conversion for everybody but the Crown, but no case of conversion at all, and that the property was still legally and equitably the real estate of the deceased partner, which would descend of course as such to the real representatives, subject to any equities the surviving partners would have. And that that was in fact so is clear, if reference be made to the conveyance in that case."

There is nothing in the facts of this case similar to the circumstances which existed in *Custance* v. *Bradshaw*. (1) It was argued for the defendants that, admitting that view of the case of *Custance* v. *Bradshaw* (1) to be correct, some agreement existed in this case, bringing it within what is said by Lindley, L.J., in the later editions of his book on Partnership. In substance what he says seems to come to this; viz., that the rule is that realty form-

(1) 4 Hare, 315. (2) 8 H. L. C. 243.
(3) Law Rep. 10 Eq. 178, at p. 191.

1883

ATTORNEY GENERAL v. HUBBUCK.

Pollock, B.

ing partnership property is converted into personalty, unless such conversion is inconsistent with some agreement which has been entered into between the partners, for in this, as in all other cases, an express agreement between the parties will override any implied intentions; and more than this, that an agreement may be implied from facts existing in a particular case contrary to the general implication of law on the subject. Accordingly, that being so, the defendants have sought to shew that there exist such circumstances in this case as to take the case out of the general rule on the ground of an agreement. By their original answer they say that no duty is payable "on the ground that the real estate belonging to the partnership between the said William Augustus Hubbuck and Edward Martin Hubbuck was not personal assets at all having regard to the express agreement between the partners, and certainly not personal assets for fiscal purposes." Then by their further answer they say that "the agreement referred to in the original answer was an agreement that the said William Augustus Hubbuck should be at liberty to make and should make such provisions with respect to his share in the freehold premises, in which the business was carried on, as are embodied in his will." They then state that, except as appearing by the will itself and the other documents thereinafter referred to, they cannot state the words in which the said agreement was made. The suggestion seems to be that there was some verbal agreement or arrangement come to before the will was made, but that except as appearing from the will itself there is no evidence what such agreement was. It seems to us that we can only, under the circumstances, look to the will itself as shewing the intention of the testator, and from the terms of the will itself, as I have already said, it seems to me clear that the testator was dealing with this as partnership property. It seems to me, therefore, that it is unnecessary to go with greater particularity into the facts or the authorities cited to us in order to come to the conclusion that this case comes within the general rule of law laid down and acted on for many years with regard to partnership property. The case does not seem to us to be brought within any exception to the rule by any peculiar circumstances shewing an intention in the partners to treat the property in question in any other way than

1883

ATTORNEY GENERAL v. HUBBUCK

Pollock, B.

as personal property; and therefore undoubtedly with regard to the will of William Augustus Hubbuck probate duty as claimed is payable.

Then with regard to the second question arising upon the will of Eliza Matilda Hubbuck, this seems to me easier of solution than the first. It is said that Eliza Matilda Hubbuck had the property left to her by that will, and, as she left it again, it must be taken in her hands to be not personalty but realty. But I think that this contention is answered by reference to the intention of William Augustus Hubbuck in dealing with the property as expressed by his will. He leaves this property as a part of his property in the business; his widow taking it as such must take it subject to all the general rules under which he held it; and, until the estate is disposed of as part of the assets of the partnership, must hold it as such. She dies leaving a will, and having disposed of it as she did, her executors take it as personal property. My Brother North, in the course of the argument, asked a very pertinent question of the defendants' counsel, viz., under which words of the will of Eliza Matilda Hubbuck the property passed, those relating to realty or those relating to personalty. This question seems to me a good way of shewing how impossible it is to contend that the property was taken by the devisees under this will as realty. I am of opinion that for the reasons I have mentioned our judgment must be for the Crown for the two amounts, viz., that claimed on the devolution from William Augustus Hubbuck and that claimed on the devolution from Eliza Matilda his widow.

HUDDLESTON, B. I am of the same opinion for the same reasons.

NORTH, J. I agree. Upon the first point I wish to refer to the case of *Waterer* v. *Waterer* (1), decided by James, L.J. There the testator had carried on business with his three sons, and gave his property to them as tenants in common. After his death they like the two Hubbucks carried on the business in partnership, and out of the moneys belonging to the estate completed a contract

(1) Law Rep. 15 Eq. 402.

1883

ATTORNEY GENERAL v. HUBBUCK.

North, J.

for the purchase of more land which was inchoate at his death, and employed such land in the business. Afterwards two of the partners purchased the share of the third in the land and business, which is exactly what happened here; and they paid for it partly out of the estate and partly out of money borrowed on the land. The two then continued the business on the land, and one of them died intestate; and it was held that both the devised and the purchased land employed in the business was converted. James, L.J., puts very shortly in his judgment the reasons to which I wish to refer. He says, "I am of opinion that this case is governed by that class of cases in which Lord Eldon said that, where property became involved in partnership dealings, it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business. If instead of Michael selling his undivided third part, there had been a partition beforehand, and then a purchase by the other partners of his allotment, it would have been impossible to say that the freehold so bought to carry on the business was not within the authorities. They buy it not as an undivided third only, but in one lump for one lump sum including the goodwill: therefore it was in fact a purchase of land and business altogether by the continuing partners jointly for the purpose of the business. Under these circumstances I think they must be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes." I pause there to say that that entirely answers the novel point suggested by Mr. Grantham, that land could be reconverted from personalty into realty by the election of one of the partners without the concurrence and against the will of the others. Then the learned Lord Justice goes on to say, "In my judgment, therefore, the land used in the trade is part of the partnership property and therefore personal estate. The house and land not used for the partnership business but let to tenants remain real estate. The mortgages must be paid exclusively out of personal estate." That seems to me to settle the case here, unless there is anything in the contention that there was some agreement between the partners to the contrary. As regards that a passage was cited from the book of Lindley, L.J.,

which I confess I do not quite understand, for, after stating the rule as applicable to cases of property acquired for the purposes of partnership, it says that it may be excluded by agreement, citing for that a case which is really not one of partnership at all, but of co-ownership. But passing that by, what agreement to the contrary was there among the partners here? The agreement stated, if any, seems to be an agreement to treat the property as personalty not as realty, because it is stated that the partners were of opinion that the share of the property would descend to the heir-at-law of William Augustus Hubbuck, which they did not wish, and to prevent that this agreement was made. I cannot find any trace of an agreement further than that there was an arrangement by which the will of the testator should be altered, by giving certain powers to the executors they would not otherwise have had. There was, however, so far as I can see, nothing to prevent the alteration of the will by the testator the next day if he had chosen to alter it. There is no agreement that the other brother should be bound to the terms of it. I can see no indication of any agreement on the part of the surviving partner, or any reason why he should not at his brother's death have required against the wish of the executors that the partnership should be wound up, and the property sold. There seems to me, therefore, no evidence of an agreement to exclude the operation of the general rule with regard to partnership property.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to Inland Revenue.*
Solicitors for defendants: *Stone, Morris, & Stone.*

E. L.

1883
April 5.

[IN THE COURT OF APPEAL.]

PRYOR *v.* THE CITY OFFICES COMPANY.

Inferior Court—Jurisdiction—Power to give Judgment under Order XL., Rule 10—*Judicature Act*, 1873, *s.* 89.

The judge of the Mayor's Court, London, has no power, on a motion before that Court for a new trial, to direct judgment to be entered for either of the parties in the action as a Judge of the High Court can do under Order XL., rule 10, no rules having been made for applying the rules of the Judicature Acts to that Court, and no such power being given to an inferior Court by s. 89 of the Judicature Act, 1873.

Where, notwithstanding such want of power, the judge of the Mayor's Court has acted as if he had such power, an appeal will lie to the Court of Appeal in respect of his having so erroneously acted.

TRESPASS to goods with a count in trover. This action, which was brought in the Mayor's Court, London, arose under the following circumstances:—One Dewing, as security for a loan, gave the plaintiff a bill of sale of his goods in an office in 27 Leadenhall Street, which belonged to the defendants, and which they had let to one Anderson. When the plaintiff went to remove these goods under his bill of sale, the hall porter, who was a servant of the defendants, and with their authority, stopped his taking them away, and locked them up, on the alleged ground that they were Anderson's goods. For this act of seizure the action was brought. At the trial before the Recorder, the jury found a verdict for the defendants. A rule nisi having been afterwards obtained on the part of the plaintiff for a new trial, the Recorder, instead of making it absolute, entered judgment for the plaintiff for 35*l.* (the agreed amount of the value of the goods) as he had, he considered, all the materials before him necessary for deciding the case, and in his opinion s. 89 of the Judicature Act, 1873, enabled him to apply Order XL., rule 10, of the Judicature rules to the proceeding which was before him in the action.

The defendants appealed.

Masterman, for the defendants. The appeal lies to this Court. The proceeding by the Recorder in entering judgment as he did for the plaintiff was erroneous, in respect of which error would

have lain to the Exchequer Chamber previously to the Judicature Acts, by virtue of s. 4 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), and by s. 18 of the Judicature Act, 1873, the Court of Appeal is now the proper tribunal to decide the matter: *Le Blanch* v. *Reuter's Telegram Co.* (1)

There have been no rules made for applying Order XL. rule 10, or any of the orders and rules of the Judicature Acts to the Mayor's Court, London, and the practice and procedure of that Court remains as it was before the Judicature Acts. Therefore on the rule nisi to set aside the verdict which had been found for the defendants and to grant a new trial, the Recorder had no power to enter judgment for the plaintiff. The rules and orders under the Judicature Acts are only for regulating "the proceedings in the High Court of Justice and Court of Appeal" (s. 16 of Judicature Act, 1875). The 91st section of the Judicature Act, 1873, which makes the rules of law declared by that Act applicable to inferior Courts does not apply, for Order XL. rule 10, is a rule of procedure and not of law, and the 91st section means to refer only to the rules in ss. 24 and 25 of that Act. *King* v. *Hawkesworth* (2) was referred to by the Recorder, where Rule LV. as to costs was held to be a rule of law within the meaning of s. 91, but this rule 10 of Order XL. is one of procedure, and in no sense can be considered as a rule of law referred to by s. 91; besides in *King* v. *Hawkesworth* (2) it appeared that the Passage Court of Liverpool (which was the inferior Court in that case) had, with the consent of the judges of the High Court, adopted the rules and orders of the Judicature Act, 1875. Then as to s. 89 of the Judicature Act, 1873, under which the Recorder professed to act. That section enacts that "every inferior Court" "shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy," "and shall, in every such preceeding, give such and the like effect to every ground of defence," &c., "in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." The giving judgment, instead of sending back the case for a new trial, is not relief within the meaning of s. 89, but is a step in the

(1) 1 Ex. D. 408. (2) 4 Q. B. D. 371.

1883

PRYOR v. CITY OFFICES CO.

procedure to which that section does not apply. Here the Recorder entered judgment for the plaintiff, notwithstanding the verdict for the defendants, that is error on the record which entitles the defendants to come here and set such judgment aside and have at least a new trial.

C. Dodd, for the plaintiff. The only appeal must now be under the Judicature Acts, by which proceedings in error are abolished (Order LVIII. rules 1 and 2.) The appeal comes here, if at all, by way of rehearing, and justice must be done by entering such judgment as ought to be. The Recorder had power to act as he did. If he had not, it was not error, but excess of jurisdiction, which would be ground for prohibition. He applied Order XL. rule 10. It is true that there have been no rules or orders made under the Mayor's Court of London Procedure Act, applying to that Court the orders and rules of the Judicature Act, 1875, but the practice has been to apply such orders and rules as far as it is possible to apply them. Sect. 89 of the Judicature Act, 1873, gives every inferior Court power to grant the same relief or remedy as can be given by the High Court, and that would give him power to do what could be done under Order XL. rule 10. *Ex parte Martin* (1) is an authority that this section gives the inferior Court power to grant an injunction, and, as shewn by *Richards* v. *Cullerne* (2), to enforce obedience to its orders by committal. The application for a new trial was as much a proceeding before the Court within the meaning of s. 89, as in that last case was the application for an attachment.

[COTTON, L.J., referred to s. 90. The word "proceeding" is there used for "action."]

It has not that limited sense in s. 89, but, as stated by Jessel, M.R., in *Richards* v. *Cullerne* (2), the words "any proceeding" in s. 89 are "applicable to any stage of an action." The 91st section shews that the Legislature intended that the inferior Courts should have the same means and power of doing justice as the High Court.

BRETT, M.R. In this case the Recorder, as the judge of the Mayor's Court, upon a motion for a new trial exercised the power

(1) 4 Q. B. D. 212. (2) 7 Q. B. D. 623.

given to a judge of the superior Court by Order XL., rule 10, and he exercised it in this way: being satisfied that he had all the materials before him to enable him to decide the case, upon a motion for a new trial he directed the judgment to be entered for the plaintiff. The defendants have appealed against that decision.

Now it is first said that this appeal cannot lie, because it is said that this is not a question of error upon the proceedings but of jurisdiction. It seems, however, to me that if there is any defect it is one which appears upon the face of the proceedings, and that therefore it is properly brought before this Court by way of appeal.

Then the question is whether that which the Recorder did was within his power. It has been suggested that the authorities of the Mayor's Court have power, by virtue of the Mayor's Court Act, or some other Act of Parliament relating to that Court, to make rules adopting such of the rules of the Judicature Act as they may deem right to adopt. It is immaterial to consider whether they have that power, because, assuming they have such power, which I doubt, they have not exercised it, and therefore this case must be considered as if there were no such power.

Then it is said that, independently of any such rules having been made, the Recorder had the power to do what he did by virtue of s. 89 of the Judicature Act of 1873. The first point, as it seems to me, to be considered is what is that which is enunciated by rule 10 of Order XL. It is a power, and nothing but a power, given to a judge of the superior Court under certain circumstances to give the relief or remedy which otherwise would be given by another procedure. Now, if that be so, the question is whether that power is given to a judge of an inferior Court by s. 89 of the Judicature Act of 1873. By that section it is said that every inferior Court "shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy" "in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." What does that enable the inferior Court to do? It enables it to grant the same relief, redress, or remedy as in the like case the High Court of Justice should grant. It can do so "in any proceed-

1883

PRYOR v. CITY OFFICES CO.

Brett, M.R.

ing." Now what is the meaning there of "in any proceeding"? It is argued that it means in any step in any proceeding which is Brought before such Court. But, as has been pointed out by my brother Cotton, the word "proceeding" is used in s. 90, and one naturally looks there to see whether in that which is a corresponding section, dealing with a similar subject-matter, one can gather any assistance as to the true meaning of the word "proceeding" in s. 89.

Now, although if s. 89 stood by itself, there might be some difficulty in determining what is the meaning of the word "proceeding," yet it seems to me to be clear what is its meaning in s. 90, and that "proceeding" in that section is a general word meant to cover every step in an action, and is equivalent to the word "action." Then s. 89 being a section in pari materia, it seems (according to the ordinary canon of construction) that "proceeding" in that section means the same as it does in s. 90, and therefore the words "in any proceeding" must be read as "in any action." They do not mean in any step in an action, but in the action itself. Therefore the power given to the inferior Court is that in any action before such Court it may give the same relief, redress, or remedy which would be given in a similar action in the superior Court. It gives to the inferior Court authority to grant the same relief, redress, or remedy as the result of the action; but it does not give such Court the same power as the judges of the superior Court have to arrive at the granting of such relief, redress, or remedy, and therefore it does not give the inferior Court the power which is given by Rule 10 of Order XL., and consequently the judgment of the Recorder cannot be supported; and as the defect appears upon the face of the proceedings it can be set right by this Court. The result will be that this case must be sent back to the Mayor's Court in order that there may be a new trial.

COTTON, L.J. I am of the same opinion. On the question whether the appeal lies to this Court I do not desire to add anything, but on the second point whether the judge of the Mayor's Court had power on the application for a new trial to give judgment for the plaintiff, I would add a few words.

1883

PRYOR v. CITY OFFICES CO.

Cotton, L.J.

The question turns on s. 89 of the Judicature Act, 1873, under which it is said the judge of the Mayor's Court had this power. That section states that "Every inferior Court shall have power to grant in any proceeding before such Court such relief, redress, or remedy," as the High Court can give.

Now is the power which is given to the High Court by Order XL., rule 10, a new remedy? It is not a new remedy, but merely a new mode of arriving at a decision of the action instead of sending it back to trial again before a jury and deciding the matter after a second trial. It is a power to take a new proceeding for the purpose of giving the appropriate remedy, but not to give a new remedy. Then the 89th section of the Judicature Act, 1873, merely says that such relief, redress, or remedy shall be given as might be given by the High Court; but it does not say that it shall be given by the same proceedings, or in the same way as it is done by the High Court. But here what is attempted to be done is to remove the parties from that course of procedure which previously must have been adopted, and to enable the inferior Court to give judgment if it thought it had all the materials before it; that, as I have already said, is not giving a relief or remedy, and in my opinion the 89th section does not give to the Judge of the Mayor's Court the power given to judges of the High Court by rule 10 of Order XL.

BOWEN, L.J. I am of the same opinion. I think that the object of s. 89 of the Judicature Act of 1873 was to clothe the inferior Courts, including the Mayor's Court, with the same power of doing effectual justice by their judgments and orders as the High Court. It was intended that these judgments or orders should be not limited and ineffectual, but that there should be a complete power of affording relief by them. In this case the judge of the Mayor's Court appears to have thought that section 89 gave him the power of applying Order XL. rule 10, of the High Court Rules without any rule especially made for the Mayor's Court enabling him to do so. He must be wrong unless the power of applying that order is itself a power of granting "relief, redress, or remedy," within s. 89. It seems to me that the relief, redress, or remedy there referred to is the judgment which is applied for,

1883

PRYOR v. CITY OFFICES CO.

and not the means of getting the judgment, and that the confusion is in supposing the relief is the same thing as the mode of getting it. I think the Mayor's Court has ample power to do justice, but it must do justice in its own way, and with its own machinery.

COTTON, L.J. I intended to add that I think that the words "in any proceeding" in s. 89 must mean, as stated by the Master of the Rolls, "in any action or suit," and that they do not mean "in a motion in any action or suit." It appears by the latter part of s. 90, which speaks of "the record in such proceeding" being transmitted to the High Court, that it means an action or suit, and not a motion in an action or suit.

Appeal allowed.

Solicitor for plaintiff: *E. Lee.*

Solicitors for defendants: *Masterman, Hughes, Masterman, & Rew.*

W. P.

April 16.

BRIGGS, APPELLANT; SWANWICK, RESPONDENT.

Salmon Fishery Act, 1873 (36 & 37 *Vict. c.* 71), *s.* 15—*Placing a Device to catch Fish—Permanent Structure erected before the passing of the Act.*

The 15th section of the Salmon Fishery Act, 1873, enacts that no person between the 1st day of January and the 24th day of June shall place in any inland water any device whatsoever to catch or obstruct any fish descending the stream.

A permanent structure for the purpose of catching eels had been erected at a weir upon a river before the passing of the above-mentioned Act. The nature of such structure was as follows:—There were floodgates or shuttles in the weir, and a grating of iron bars, through which the eels could not pass, was fixed below such floodgates. When the floodgates were raised the rush of water through them carried the eels on to and over the end of the grating into a trough, which communicated with a well from which they could not escape. The appellant, on a day between the 1st of January and the 24th of June, 1882, raised the flood-gates and so brought the trap into action, with the result that eels were caught in the trap:—

Held, that by so doing the appellant had been guilty of an offence within the above-mentioned section.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information had been preferred by the respondent against the appellant under s. 15 of 36 & 37 Vict. c. 71, charging him

with unlawfully placing in an inland water called the river Tame on the 2nd of June, 1882, a certain device, to wit, an eel-trap, to catch fish descending the stream.

It appeared in evidence at the hearing of such information that the appellant was the occupier of certain mills called Alder Mills, on the river Tame, in the township of Wigginton, in the county of Stafford, under a lease for twenty-one years from the 25th of March, 1872, and that the eel-trap in question had been built in 1838 for the appellant's lessor, by a builder from Tamworth, at the end of a weir belonging to the demised premises. The trap appeared to be a permanent structure of the following character:—There were floodgates or shuttles in the weir, and a grating of iron bars, through which the eels could not pass, was fixed below such floodgates. When the floodgates were raised the rush of water through them carried the eels on to and over the end of the grating into a trough, which communicated with a well from which they could not escape.

The eel-trap was mentioned in the lease of the mill as being demised to the appellant.

On the day mentioned in the information one of the witnesses found that the floodgates were up and eels and other fish were in the trap. The appellant admitted that only he and his sons worked the trap. It appeared that no salmon were found in the river Tame. It was contended for the appellant that he did not place the eel-trap in the river, the same being a permanent structure erected before the passing of 36 & 37 Vict. c. 71, and also that the Act was not intended to apply to such a device as the eel-trap in question; but to devices of a temporary and moveable nature placed in an inland water after the passing of the said Act.

It was also contended that by the terms of the appellant's lease he was bound to raise the floodgates or shuttles to allow the high water to escape, so as to prevent its flooding the meadows adjacent to the river above the weir; but the evidence shewed that on the day in question there was no water passing over the weir. The justices convicted the appellant.

The questions for the opinion of the Court were whether the 15th section of 36 & 37 Vict. c. 71, was intended to apply to a

1883

BRIGGS v. SWANWICK

solid and permanent structure, such as the eel-trap in question, erected before the passing of the Act, and whether the appellant could be said to have "placed" the device, to wit, the eel-trap, in the water on the date charged in the information.

Dugdale, Q.C., for the appellant. The words "shall place a device" can only apply to something done after the passing of the Act. This device was placed in the river long before the Act was passed. The section does not seem to be meant to apply and cannot be applied to permanent structures erected before the passing of the Act. The appellant had no right as against his lessor to remove this structure, which formed part of the premises demised to him.

[FIELD, J. As long as the flood-gate is down the structure is not a device for catching fish. The appellant did something after the passing of the Act: he raised the floodgate, by which act the device was brought into operation.]

It is submitted that that is not placing a device in the river. The Act would have said "place or use a device" if the use of an existing permanent structure had been meant. It is contended that, having regard to the whole scope of the Act, the section was intended to apply only to waters frequented by salmon.

[FIELD, J. No such question as that appears to be raised by the case.]

Willis Bund, for the respondent, was not called upon.

FIELD, J. I think that the decision of the magistrates was correct. The 15th section of 36 & 37 Vict. c. 71, enacts that between certain days no person shall place in any inland water any device whatsoever to catch or obstruct fish descending the stream. The provisions of the Act for the most part apply to migratory fish of the salmon species; but it is clear that the terms "any inland water" include all inland waters, whether frequented by fish of the salmon tribe or not. The words are "any device whatsoever." There is no doubt that when the floodgate is raised the structure in question is a most effective device for catching the fish, and it is quite immaterial whether it is of a permanent or a temporary nature. Then the question

remains whether the appellant can be said to have placed it in the river within the meaning of the section. It appears to me that he may be said to have done so, because in its normal condition the thing does not act as a trap at all. It is only when the floodgate is raised that it becomes a trap. The appellant, therefore, did something after the passing of the Act, and he did something which had the effect of bringing into action a device for catching and obstructing the fish descending the stream.

1883

BRIGGS v. SWANWICK.

MATHEW, J. I am of the same opinion. It seems to me that by "placing a device" is intended what in more popular language would be called setting a trap. The structure here in question is no trap till the floodgate is raised. I think that, by raising the floodgate and so bringing the device into operation within the time specified by the Act, the appellant did an act which the section prohibits.

Conviction affirmed.

Solicitors for appellant: *Nevill & Atkins.*
Solicitors for respondent: *A. R. & H. Steele, for Eddowes.*

E. L.

THE QUEEN *v.* MAURER.

April 16.

Extradition—33 & 34 *Vict. c.* 52, *ss.* 9, 10—*Jurisdiction of Magistrate—Decision of Magistrate conclusive—Weight of Evidence.*

Upon an application for a habeas corpus in the case of a fugitive criminal committed by a police magistrate under the Extradition Act, the Court has no power to review the decision of the magistrate on the ground that it was against the weight of the evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter.

THIS was an application for a habeas corpus in the case of one Maurer, for whose extradition the German government had applied under the treaty between Germany and this country in respect of an alleged crime against the bankruptcy laws of Germany, and who had been committed by a police magistrate to await the warrant of the Secretary of State for his extradition for such crime.

1883

THE QUEEN v. MAURER.

Bowen Rowlands, Q.C., moved for a rule nisi accordingly. He contended that there was no evidence upon the depositions before the magistrate that the prisoner had been guilty of any bankruptcy crime according to the law of England, and consequently no evidence of an extradition crime within the Extradition Act, 1870, s. 26. He further contended, in effect, that the magistrate was wrong in deciding upon the evidence before him that there was a primâ facie case against the prisoner of a bankruptcy crime according to the law of this country, and that such decision was against the weight of the evidence.

[He cited *Huguet's Case* (1); Clarke on Extradition, 2nd ed. p. 156.]

FIELD, J. I think that this application must be refused. It is clear that the provisions both of the Extradition Act and the treaty require that the crime for which the extradition of the criminal is to take place should be a crime according to the laws of both the contracting states. The 9th and 10th sections of the Act provide that, when a fugitive criminal is brought before the police magistrate, he shall hear the case in the same manner and have the same jurisdiction and powers as near as may be as if the prisoner were brought before him charged with an indictable offence in England, and, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, &c. The counsel for the prisoner has put forward two grounds for this application. Taking the second ground first, it is that on the balance of the evidence laid before the magistrate such evidence was not sufficient to justify the conclusion to which the magistrate came. On that question we were referred to *Huguet's Case* (1) and the observations made on that case in Clarke on Extradition, 2nd ed. p. 156. The author there says, "The very important question was raised in that case whether the Court would examine the sufficiency of the evidence

(1) 29 L. T. (N.S.) 41.

before the police magistrate, and the Court held that it was not called upon to do so. In that case Martin, B., said, in giving judgment, 'The question is whether this was a proceeding within the jurisdiction of Sir Thomas Henry. I do not say that if there had been no evidence before him or he had acted contrary to law we would not have discharged the prisoner, but it appears to me that all the proceedings have been properly taken. This is not a Court of Appeal from his decision, and it is for him to decide whether or not the evidence is sufficient.' This question of the power of the Court to examine the weight as well as the competency of the evidence before the police magistrate has been much argued and variously decided in the United States, and will probably be discussed further in England. The case mentioned above is obviously not conclusive of the matter."

It appears to me, however, that the decision in *Huguet's Case* (1) is completely in accordance with the principles upon which the Courts act and have always acted with reference to the adjudications of justices in general, and without that decision I think we should have come to the same conclusion. The statute says that the magistrate shall have the same jurisdiction as nearly as possible as if the prisoner were brought before him charged with an indictable offence in England. So long as the magistrate keeps within his jurisdiction we have no power to interfere with his decision. It is only when there is no jurisdiction, as when there is no evidence before the magistrate, that we can interfere. It seems to me that in *Huguet's Case* (1) all the judges intended to decide that it was not for this Court to weigh the evidence, if there was any reasonable evidence of an extradition crime for the magistrate to act upon. If there is such evidence the magistrate is not going beyond his jurisdiction in committing the prisoner upon such evidence.

The remaining point is, whether there was any reasonable evidence for the magistrate that the prisoner had committed an extradition crime. [His Lordship then discussed the facts as appearing on the depositions laid before the magistrate.] It seems clear to me that upon the facts appearing from the depo-

(1) 29 L. T. (N.S.) 41.

1883

THE QUEEN v. MAURER.

sitions there was evidence against the prisoner of the crime alleged against him.

MATHEW, J. I am of the same opinion. The conditions of the magistrate's jurisdiction are clearly indicated by the Extradition Act. The crime in respect of which extradition is sought must be a crime against the law of both the contracting states, and there must be primâ facie evidence that the prisoner is guilty of such crime. There must be such evidence as according to the law of England would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in England. It appears to me that in the present case there was such evidence. I agree with my Brother Field that there being such evidence we have nothing to do with any question as to the weight of the evidence. There is no provision in the Act giving any right of appeal to us against the magistrate's conclusion. The only application open to the prisoner is for a writ of habeas corpus, and that application can only succeed when the magistrate has exceeded his jurisdiction.

Application refused.

Solicitors for prisoner: *Bordman & Co.*

E. L.

April 28.

FAWCUS *v.* CHARLTON.

Practice—Pleading—Notice in lieu of Claim—Order XXI., r. 4—Objection on ground of Insufficiency—Demurrer.

A writ was specially indorsed, "The plaintiff's claim is against the defendant as the acceptor of a bill of exchange. The following are particulars:—Bill of exchange for 180*l.*, dated 27th of March, 1882, drawn by C. upon and accepted by defendant, payable three months after date."

The plaintiff having delivered a notice under Order XXI., r. 4, that his claim was that which appeared by the indorsement on the writ, the defendant demurred on the ground that the statement was insufficient and disclosed no cause of action:—

Held, that there was no ground of demurrer, and that the defendant's remedy, if any, was to apply for a further statement under the rule.

Robertson v. *Howard* (3 C. P. D. 280) disapproved.

IN this action the writ was specially indorsed, "The plaintiff's claim is against the defendant as acceptor of a bill of exchange.

The following are particulars:—Bill of exchange for 180*l.*, dated 27th March, 1882, drawn by A. M. Cohen & Co., upon and accepted by the defendant, payable three months after date."

The plaintiff having delivered a notice under Order XXI., rule 4 (1), that his claim was that which appeared by the indorsement on the writ; the defendant demurred.

Poulter, in support of the demurrer. *Robertson* v. *Howard* (2) is an authority that the indorsement is, under the circumstances, a pleading, and bad on demurrer. There the mere statement that money was owing on an agreement was held insufficient. Here the indorsement does not shew what interest the plaintiff has in the bill of exchange, or whether it is a negotiable instrument.

[MATHEW, J. *Robertson* v. *Howard* (2) has been much doubted. Is not your only remedy to apply to a judge under the rule for a further statement?]

There is no reported decision inconsistent with *Robertson* v. *Howard* (2), and the statement there was less open to objection than the one here. The fact that the notice and indorsement are according to the forms in Appendix A. part 2, s. 2, and Appendix B., No. 3, does not exempt the plaintiff from the necessity of delivering a statement good on the face of it.

Meysey-Thompson, for the plaintiff, was stopped.

WATKIN WILLIAMS, J. This demurrer must be overruled. The Judicature Acts intended to shorten and simplify the pleadings which had formerly been adopted, and with that object the rule was framed enabling the plaintiff to give notice that his claim was that which appeared by the indorsement on the writ. Now without saying that a statement of claim worded like the one before us would be for all purposes good, I think that in the present case any objection as to the sufficiency of the notice cannot be raised by demurrer. There may possibly be cases

(1) Order XXI., r. 4: "Where the writ is specially indorsed and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement on the writ, unless the Court or a judge shall order him to deliver a further statement. Such notice may be in the Form No. 3 in Appendix B. hereto."

(2) 3 C. P. D. 280.

1883

FAWCUS v. CHARLTON.

where the writ having set out all the facts, the defendants may demur on the ground that they shew no cause of action. But where, as here, the complaint is that the statement gives imperfect and incomplete particulars of the claim, the proper course is not to demur, but to apply to a judge under the rule for a further statement.

MATHEW, J. I am of the same opinion. The intention of those who framed the rules was to supply a number of forms which might be adopted in lieu of statements of claim in those numerous cases where the defendant knows very well, or may be presumed to know, the particulars of the plaintiff's case. If the form does not give the defendant sufficient information, he has an easy remedy by applying for a further statement. It can never have been meant that he should proceed by demurrer.

Judgment for the plaintiff.

Solicitor for plaintiff: *H. W. Chatterton.*
Solicitor for defendant: *J. H. Ward.*

A. P. S.

Feb. 14.

GAGE, APPELLANT; ELSEY, RESPONDENT.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 8—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6—*Gin more than* 35 *Degrees under Proof.*

By s. 6 of 42 & 43 Vict. c. 30, it is provided that "in determining whether an offence has been committed under 38 & 39 Vict. c. 63, s. 6, by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . . 35 degrees under proof for gin."

The appellant sold to the respondent gin more than 35 degrees under proof, but, at the time of sale, brought to his knowledge a printed notice hanging up in the room to the effect that all spirits were sold "as diluted spirits, no alcoholic strength guaranteed":—

Held, that although the appellant had not a good defence under 42 & 43 Vict. c. 30, s. 6, he was not by that section deprived of any defence which he would have had under 38 & 39 Vict. c. 63, and that the sale not having been to the prejudice of the purchaser, no offence had been committed under 38 & 39 Vict. c. 63, s. 6.

CASE stated by justices for the county of Essex under 20 & 21 Vict. c. 43.

1883

GAGE v. ELSEY.

The respondent, a superintendent of police and an inspector under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), laid an information against William Gage, the appellant, an innkeeper at Braintree, for unlawfully selling to the respondent, to the prejudice of the purchaser, three pints of gin which was not of the nature, substance, and quality demanded by him. It was proved at the hearing that the appellant asked to be supplied with some gin. The appellant inquired what sort he wanted, to which the respondent replied, "The same that you sell to the public." The appellant said that he kept different sorts, whereupon the respondent pointed to a cask, and said, "What is that?" The appellant replied, "Gin," and the respondent said he would have three pints of it. The appellant then said, "That is what we sell to the public, and there is our notice." There was, hanging up in the room, a notice to which the appellant pointed, and which was to the following effect:—

"NOTICE.—All spirits sold in this establishment are of the same superior quality as heretofore, but to meet the requirements of the Food and Drugs Adulteration Act they are now sold as diluted spirits, no alcholic strength guaranteed."

The appellant then supplied three pints of gin, for which the respondent paid 5*s*. Upon analysis the county analyist found by his certificate that it contained 59½ per cent. of proof spirit, and was 40½ degrees under proof; that is, it had been diluted with water so as to reduce its strength to 5½ degrees below the minimum strength allowed by the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6. The appellant contended that as at the time of the purchase of the gin a notice to the effect that it was sold as diluted spirit was hanging up in his room, and as the attention of the purchaser was specially directed to it, the sale was not to the prejudice of the purchaser. The justices held that these facts did not justify the sale, and convicted the appellant.

C. E. Jones, for the appellant. The appellant had a good defence under the Act of 1875, for the notice on the wall was a sufficient mode of bringing knowledge home to the purchaser:

1883

GAGE v. ELSEY.

Sandys v. *Small*. (1) Here the purchaser's attention was called to the notice.

Grubbe, for the respondent. The 6th section of the Act of 1879 altered the law with respect to the sale of diluted spirits. It prohibits the mixing of water with spirits beyond a certain amount. In the case of gin, the seller has only a good defence where the spirit is of a strength not less than 35 degrees under proof, and he cannot avail himself of the defence which he would previously have had under the Act of 1875. (2)

MANISTY, J. The magistrates have convicted the appellant of selling adulterated gin, and it is necessary to consider the evidence upon which they acted. The county analyst shewed that the gin was so diluted as to reduce its strength 5½ degrees below the minimum allowed by the Act of 1879, and upon that evidence the magistrates thought that the appellant had no defence. It is clear upon the authority of *Sandys* v. *Small* (1) that, notice having been given to the respondent that the article sold to him was not of the nature, substance, and quality of the article demanded, there was no sale to the prejudice of the purchaser, and no offence within the meaning of s. 6 of the Act of 1875. The appellant cannot indeed avail himself of a defence under s. 6 of the Amending Act of 1879, the gin being below the minimum

(1) 3 Q. B. D. 449.

(2) 38 & 39 Vict. c. 63, s. 6, provides, that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, or quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. The section then sets out certain excepted cases in which it shall not be deemed that an offence has been committed under the section.

Sect. 8 provides, that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

42 & 43 Vict. c. 30, s. 6, provides, that in determining whether an offence has been committed under s. 6 of the said Act (38 & 39 Vict. c. 63) by selling, to the prejudice of the purchaser, spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . . 35 degrees under proof for gin.

1883

GAGE v. ELSEY.

strength allowed by that section; but he is not deprived of any defence which he may have under the Act of 1875. This conviction must be quashed.

MATHEW, J. I am of the same opinion. The 6th section of the Act of 1879 specifies one good ground of defence, but does not say there shall not be a good defence on any other ground, and in this case it is impossible to hold that the gin was sold to the prejudice of the purchaser.

Judgment for the appellant.

Solicitors for appellant: *Randall & Angier, for Jones & Son, Colchester.*

Solicitor for respondent: *Clerk of the Peace for Essex.*

J. R.

[IN THE COURT OF APPEAL.]

Jan. 17.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA *v.* THE NETHERLANDS INDIA STEAM NAVIGATION COMPANY, LIMITED.

Ship—Bill of Lading—Exceptions—Collision between Two Ships belonging to same Owner—Negligence of Master and Crew—Action of Tort—Variance between Rules of Admiralty Court and Courts of Common Law—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

The plaintiffs shipped goods on board the defendants' vessel, the *Crown Prince*, under a bill of lading, which contained exceptions of, amongst other things, "collision," and "accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company, in navigating the ship." In the course of the voyage the *Crown Prince* came into collision with another vessel of the defendants, the *Atjeh*. The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the *Atjeh* was mainly in fault; but the *Crown Prince* also was in some degree to blame:—

Held, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of a failure to perform the undertaking therein contained to carry the goods safely upon the voyage:—

Per Brett, L.J.:—No stipulation on the part of the defendants could be implied as to the conduct of those on board the *Atjeh*, and although the negligence of the *Atjeh* was not within the exceptions, nevertheless it was not within the contract created by the bill of lading:—

Per Baggallay and Lindley, L.JJ.:—The exception "collision," although it

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

did not cover the negligence of the *Crown Prince*, covered the negligence of the *Atjeh*, and the defendants were expressly relieved from liability for the negligence of the *Crown Prince* by the other exceptions in the bill of lading:—

Held, further, that the defendants were liable in tort for the negligence of those engaged in navigating the *Atjeh*, but that the amount payable by the defendants must be limited to one half of the loss sustained by the plaintiffs, pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9.

APPEAL by the defendants from the judgment of the Queen's Bench Division (Pollock, B., Manisty, and Stephen, JJ.), in favour of the plaintiffs.

The facts are stated in the report of the judgment of Pollock, B., delivered in the Queen's Bench Division (1); and it is only necessary here to give the following short summary of them.

The action was brought by the plaintiffs, as owners of goods shipped under a bill of lading in the defendants' vessel the *Willem Kroon-Prins der Nederlander* (called hereafter the *Crown Prince*), and lost through a collision between that vessel and the *Atjeh*, another vessel of the defendants. The jury at the trial found that the *Atjeh* was mainly in fault in causing the collision, but that the *Crown Prince* was also in some degree to blame. The bill of lading excepted, among other things, (1), collision; (2), accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master or mariners, or other servants of the company in navigating the ship.

1882. Nov. 10, 11, 13, 14, 15. *Benjamin, Q.C.*, and *Cohen, Q.C.* (*Raikes*, with them), for the defendants. The defendants are not liable on the contract, as the loss was occasioned by collision, and "collision" is expressly excepted by the bill of lading. It will be said on the part of the plaintiffs that, inasmuch as the collision arose from the negligence of the servants of the defendants who were navigating the *Atjeh*, the loss will be referred to negligence, and that it is immaterial that the peril "collision" is excepted; and in support of that the plaintiffs will rely on *Phillips* v. *Clark* (2); *Lloyd* v. *General Iron Screw Collier Co.* (3), and *Grill* v. *General Iron Screw Collier Co.* (4) The answer is that the

(1) 9 Q. B. D. 118, at p. 120.
(2) 2 C. B. (N.S.) 156; 26 L. J. (N.S.) C. P. 168.
(3) 3 H. & C. 284; 33 L. J. (Ex.) 269.
(4) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.

defendants knew of those decisions when the bill of lading was given, and therefore by the express words of it excepted from their liability not only "collision" in the legal sense of the word, but also collision caused by the negligence of their servants; for that is the effect of the exceptions contained in the bill of lading. When a cargo is shipped, the parties to the shipment contract only as to the carrying ship and the management of her; they do not contract with reference to the management of other ships; the authorities relied upon by the plaintiffs were not intended to apply to so unusual a case of collision as this, in which the two ships in collision belonged to the same owners. The doctrine as to the liability of shipowners is not carried further by the decision in *Czech* v. *General Steam Navigation Co.* (1); and it was there held that where goods have been shipped under a bill of lading containing the usual exceptions and are damaged during the voyage, the owner of them must prove affirmatively that the shipowner or his servants have been guilty of negligence.

[BRETT, L.J. In the passage from Story on Bailments, s. 512 A, referred to in the judgment of the Queen's Bench Division (2) the writer was obviously speaking of negligence on the part of those on board the carrying ship.]

The facts in *Steele* v. *State Line Steamship Co.* (3) are not precisely in point for the present case; but Lord Blackburn points out (4), that a shipowner may protect himself by express contract from the consequences of the negligence of his servants; and this is what the defendants have done by the terms of the bill of lading in the present case. A purely accidental collision is provided for by the exception "perils of the seas"; and further under a bill of lading simply excepting "perils of the seas," the shipowner is not liable for the negligence of another shipowner which injures the goods. The same principle must apply to the negligence of those on board another ship of the same owner. If the word "collision" were not in the bill of lading, the defendants would not be liable; and à fortiori, they are not liable when it is inserted. At any rate the word "collision" must be read in an absolute sense, and it must be assumed that it

(1) Law Rep. 3 C. P. 14.
(2) 9 Q. B. D. at p. 123.
(3) 3 App. Cas. 72.
(4) 3 App. Cas. 72, at p. 88.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

was put in to relieve the defendants from the consequences of a collision occasioned by negligence. It may perhaps be unnecessary to contend that the contract in the bill of lading is not governed by English law, but at all events, the collision and its consequences depend upon the law of Holland. Moreover, it must be taken that the negligence of those on board the *Crown Prince* materially contributed to the loss; and therefore the defendants are not liable for the consequences of that loss owing to the terms of the bill of lading, which clearly exempts them from responsibility for that negligence.

As to the liability of the defendants in an action of tort, it is to be recollected that the collision took place between two Dutch ships upon the high seas; for they really belonged to a Dutch company distinct from the defendants, who are an English company; but the defendants take upon themselves full responsibility for the acts of the Dutch company. The liability must be determined by the Dutch law, and by that law the defendants are not liable. The tort was committed upon the high seas and must be taken to have been committed upon Dutch territory; and "no action can be maintained in the Courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country:" *The M. Moxham.* (1) This doctrine is supported by *The Halley* (2); *Phillips* v. *Eyre.* (3) No ship is to be deemed British unless she belongs to British subjects: Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), part II. sect. 18; and the rights of the parties must be determined by the flag: *Lloyd* v. *Guibert* (4); *The Gaetano and Maria.* (5) Even if the Dutch company are to be considered as mere trustees for the defendants, a British subject may change the national character of his ship, and may transfer his legal interest to the inhabitant of a foreign country, while he retains the beneficial ownership in himself: a ship may thus become a foreign vessel, although she is owned by a British subject.

(1) 1 P. D. 107; per Mellish, L.J., at p. 111.
(2) Law Rep. 2 P. C. 193.
(3) Law Rep. 6 Q. B. 1.
(4) Law Rep. 1 Q. B. 115.
(5) 7 P. D. 137.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Further, the plaintiffs' goods were on board the *Crown Prince*, and those who were engaged in navigating that vessel were guilty of negligence, directly contributing to the loss: *Tuff* v. *Warman* (1): the plaintiffs were identified with them, and on this ground they cannot recover: *Thorogood* v. *Bryan* (2); *Waite* v. *North Eastern Ry. Co.* (3); *Child* v. *Hearn.* (4)

[BAGGALLAY, L.J., referred to *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (5)]

If, however, the defendants are liable in tort, they are liable for only half the damage which the plaintiffs have sustained: Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9.

Although it is admitted for the defendants that they are to be deemed liable to compensate the plaintiffs, if the Dutch company can be held liable, it must be recollected that the Dutch company is different from the individuals who compose it: a Dutch company is the legal owner, and therefore the ships are Dutch, not English; they are not subject to the provisions of the English law such as those contained in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

[BRETT, L.J. If the real owner is a British subject, and if a foreigner is a bare trustee for him, cannot the ship be registered as a British ship?]

No: *Long* v. *Duff.* (6)

The *Crown Prince* was a Dutch ship, and the liability of the defendants is to be determined, not according to the English law, but according to the law of Holland to which she belonged. According to the Dutch law the damage occasioned by a collision is to be compensated only by the master of the ship which occasioned it, and if it has been caused by faults on both sides each bears his own damage: Commercial Code of the Netherlands, arts. 321, 534, 535.

Butt, Q.C., and *Myburgh, Q.C.* (*Barnes*, with them), for the plaintiffs. The defendants are liable for the loss, and may be sued either on the contract arising out of the bill of lading, or in tort.

(1) 2 C. B. (N.S.) 740; 5 C. B. (N.S.) 573.
(2) 8 C. B. 115.
(3) E. B. & E. 719.
(4) Law Rep. 9 Ex. 176.
(5) Law Rep. 10 Ex. 47.
(6) 2 B. & P. 209.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

As to an action in tort the Dutch law cannot apply. In suits in the English Admiralty Court arising out of collisions between two vessels, the nationality of the vessels is never inquired into: *The Johann Friederich* (1), and the law which is applied is the English maritime law. The *Crown Prince*, however, was not a Dutch vessel for the purposes of this inquiry, for her owners the defendants are an English company, and the goods of the plaintiffs were taken on board the ship at Singapore, an English port. But even if she be a foreign vessel, she does not carry the foreign law with her, except as to acts done on board the vessel herself. Mellish, L.J., in *The M. Moxham* (2) says: "I agree that as to acts done on board a ship itself no doubt the English ship carries the English law with it, but I am not convinced that it carries the English law with it with reference to wrongful acts done by guiding an English ship against a pier which is part of the foreign country"; and Lindley, L.J., in the case of *The Franconia, Reg.* v. *Keyn* (3), shews that the doctrine that a merchant ship is part of the territory of the country whose flag she bears, holds good only to a very limited extent, and the other judges who heard that case did not dissent from him in his observations on that doctrine. Even if the liability of the defendants is to be governed by the Dutch law, it has not been shewn that the owners of the ship would not be liable, but at the most (as appears from the code), the liability of the owner is limited to the liability of the master. The code certainly never contemplated the case of a collision between two vessels belonging to the same owner: Commercial Code of the Netherlands, arts. 536, 538. The case of *The Halley* (4) was the converse of the present case. It was the case of collision between a British and a foreign vessel in foreign waters where, according to the foreign law, the owners of the ship causing the accident were liable; but as they were not liable according to the law of England, the Privy Council held that no suit in this country could be maintained against them. That case, therefore, supports the right of the present plaintiffs to maintain an action for tort. Contributory negligence on the part of the *Crown Prince*

(1) 1 Wm. Rob. 35.
(2) 1 P. D. 107, at p. 112.
(3) 2 Ex. D. 63, at p. 93.
(4) Law Rep. 2 P. C. 193.

does not prevent the plaintiffs, the owners of the cargo, from suing for the loss occasioned by the collision; and *Thorogood* v. *Bryan* (1), where the contrary appears to have been decided, was overruled as to this by *The Milan*. (2) It has been argued that if the plaintiffs are entitled to recover in tort it can only be for half the damage, according to the Admiralty rule, and the Judicature Act, 1873, s. 25, sub-s. 9. That rule, however, does not apply where the owners of the one vessel are also the owners of the other. The Admiralty rule is, as stated by Jessel, M.R., in *Chapman* v. *Royal Netherlands Steam Navigation Co.* (3), "to take the amount of damage done to each vessel, to add them together and to halve the amount, so that each owner is, inter se, to bear half, and then to ascertain who is to pay to the other. . . . The one party who wins recovers from the other party who loses, damages by reason of the collision." That cannot be applied here, for how can a man sue himself?

Next, if not liable in tort the defendants are liable on the contract. On that ground they are clearly liable, as was held in the Court below. Unless the case comes within the excepted perils, the defendants are liable on their contract to carry and deliver. "Collision," according to the limitation put on it by the authorities, does not mean collision caused by the negligence of the servants of the defendants: *Lloyd* v. *General Iron Screw Collier Co.* (4); *Grill* v. *General Iron Screw Collier Co.* (5); *Phillips* v. *Clark* (6); *Ohrloff* v. *Briscall, The Helene* (7); *Taylor* v. *Liverpool and Great Western Steam Co.* (8); *Hayn* v. *Culliford.* (9)

Cohen, Q.C., in reply. In order to support the contention for the plaintiffs, it must be held that upon the terms of the bill of lading, the defendants are liable for the negligence of their servants wherever it has been committed; a construction of that kind would be wholly unreasonable, although there may be an implied contract that the shipowners will take due care to carry

(1) 8 C. B. 115.
(2) 1 Lush. 388.
(3) 4 P. D. 157, at p. 160.
(4) 3 H. & C. 284; 33 L. J. (N.S.) Ex. 269. 10 Jur. N.S. 661
(5) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.
(6) 2 C. B. (N.S.) 156; 26 L. J. (C. P.) 168. 3 Jur. N.S. 467.
(7) Law Rep. 1 P. C. 231.
(8) Law Rep. 9 Q. B. 546.
(9) 4 C. P. D. 182.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

and to prevent the goods from being damaged, even by the excepted perils; but the collision was caused by the negligence of those on board the *Atjeh*, and therefore the defendants cannot be liable in contract. The bill of lading, being for the shipment of goods on board a Dutch vessel, must be construed according to the law of Holland.

Cur. adv. vult.

1883. Jan. 17. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiffs, the owners of part of a cargo, have brought their action against the defendants, who are shipowners, for loss by reason of the cargo being sunk at sea, and the plaintiffs have shaped their action in two forms. First, they have sued for a breach of contract in not carrying and delivering the goods safely; and secondly, they have sued the defendants in tort, that is to say, in what was formerly an action on the case, for the loss of these goods by reason of the negligence of certain servants of the defendants. Now, into the circumstances and the facts of this case I need not go, for they have been already stated in the Court below, but as the decision of the Divisional Court, if that judgment is to stand, has made this case one of general importance, I have thought it right to give my own opinion upon it, notwithstanding the judgment which is to be given on behalf of my learned Brothers.

As far as the case upon the contract is concerned, it should be first observed that the whole of that contract is a contract in writing. The contract no doubt is a contract of carriage, but the contract has been by the consent of the parties reduced into the form of a bill of lading, and therefore the whole of the contract is contained in that bill of lading, and no terms of the contract outside of the bill of lading, can be looked at. The questions which arise upon the action when considered as an action of contract, are first, by what rule or by what law is that contract which is contained in this bill of lading to be determined? secondly, what is the true construction of that bill of lading? and, thirdly, to what matters does that bill of lading apply? It has been suggested on the part of the defendants that this bill of lading is a foreign bill of lading, that it is a

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

Dutch bill of lading, and is to be construed according to the Dutch law. I doubt if the construction would be different whether this were a Dutch bill of lading or an English bill of lading. It is a contract in writing, and no evidence of any particular mode of construing it in Holland was given. But it seems to me clear beyond dispute that this was an English bill of lading, and is to be construed according to the English rules of construction. It is true the bill of lading was given by the captain of a ship which is registered in Holland, and which ship carried the Dutch flag; and it was suggested that on that account the contract must be considered as a Dutch contract. If the ship be English, the whole of that contention falls to the ground; but even if this is to be regarded as a Dutch ship, it seems to me that the contract is nevertheless English. It may be true in one sense to say that where the ship carries the flag of a particular country, primâ facie the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is, and by what rule it is to be construed, is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties. In this case the persons for whose benefit the ship was employed and for whom the ship was earning profit, were undoubtedly the defendants, every one of whom is an Englishman. The defendants are registered in Holland as a Dutch company, but they are also registered in England as an English joint stock company. The contract was made in an English form. The contract therefore was made by a servant and agent of the defendants who authorized that contract to be made in order to obtain profit for themselves. The contract was made for the carriage of goods from an English port to a Dutch port, it was made with an English merchant; the contract was drawn up in the English language in the ordinary form of an English bill of lading, and the defendants were named in the contract as a limited company, in other words, they were described as an English company. It seems to me that upon taking those circumstances into consideration, the inference is irresistible that it was the intention of the parties that the contract should

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

be an English contract, even though one considers the ship to have been a Dutch ship, which I think she was not. If the contract be English it must be construed according to the rules for construing an English bill of lading. These goods were lost as the immediate result of a collision. If no exceptions had been contained in the bill of lading it would not have signified how that collision occurred. By the first part of the bill of lading an absolute contract is entered into to carry the goods safely and deliver them safely. Therefore within the terms of the written contract the defendants would have been liable for a breach of contract from the mere circumstance of not delivering the goods safely at the end of the voyage. But the bill of lading contains exceptions, and the question arises, where a loss is occasioned by a collision, whether the exceptions in the bill of lading relieve the defendants from the consequences of a loss which is the inevitable result of a collision. It is obvious that three kinds of collision may happen. A collision at sea may arise from mere accident, that is, without any default on the part of those who are navigating either ship, and if a collision of that kind occurs it is within the exception of accidents of the sea. If there be no exception of collision in terms, and no exception of negligence in terms, yet a collision which is the result of mere accident (although a collision according to Dr. Lushington can hardly ever happen without fault of either party) is an accident of the sea, and therefore the shipowner would be absolved by reason of the exception of accidents of the sea. But a collision may happen either by the default of those on board the ship which is carrying the goods, or by the default of those who are conducting another ship without any fault on the part of the ship which is carrying the goods, and also a collision may happen which is the fault of those on board each ship. If the collision is caused without any fault on the part of the carrying ship, but is caused by reason of negligence on the part of those who are conducting the other ship, it cannot be called an accident of the sea. An accident is that which happens without the fault of anybody, and consequently a collision which is the fault of somebody is not an accident of the sea. Therefore if no exception were contained in the bill of lading except that of accidents of the

11 QBD 48

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

sea, although there was no fault on the part of those on board the ship carrying the goods, although the collision was caused by the sole default of those on board the other ship, the owner of the carrying ship would be liable on the first part of the bill of lading. In order to meet such a case as that the exception of collision was put, and if no other cause could be given in evidence as a cause of the loss but collision, the Court would have no right to construe that word "collision" by limiting it in any way. It would cover every collision. It certainly covers a collision where there is no fault of those on board the carrying ship, but where it was the sole fault of those on board the other ship.

But a loss may be the immediate result of a collision, brought about by the negligence of those on board the carrying ship. If that must be treated as a loss by collision it will be covered by the exception of collision alone; but in a bill of lading as distinguished from a policy of insurance we are entitled to look at what was the real cause of the loss, that is, as it is expressed in our legal phraseology, we may look at the causa causans instead of merely looking at the causa proxima; and where a collision has happened and the negligence of those on board the carrying ship was the real substantial cause of the loss, a court of justice may hold that it was a loss by the negligence of the captain and crew. Although a collision may have been the immediate cause of the loss, yet on looking at the causa causans it is a loss by reason of negligence. It was held in the case of *Lloyd* v. *General Iron Screw Collier Co.* (1), which is really the ruling case with regard to the question of collision and the exception of collision, that a court of justice might look at the causa causans; and it seems to have been further held in that case, and in a former case with regard to breakage and leakage, *Phillips* v. *Clark* (2), that in every bill of lading an undertaking by the shipowner is to be implied that the master and the crew shall use ordinary care with regard to the carriage of the goods, and that negligence on the part of the master and crew causing the loss of the goods is a breach of that implied stipulation to carry the goods with ordinary care; and therefore it was held in *Lloyd* v. *General Iron Screw*

(1) 3 H. & C. 284; 33 L. J. (Ex.) 269. 16 Jur. N.S. 661

(2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168. 3 Jur. N.S. 467

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

Collier Co. (1) that inasmuch as the causa causans might be looked at and the loss was a loss caused by the negligence of the master and the crew, the collision was to be taken only as a circumstance in the loss, the negligence of the crew being the moving cause of it, that that was a breach of the implied contract to use ordinary care and skill, and, therefore, that the breach of that implied contract was not within the exception as to collisions. But in this bill of lading in order to meet that argument the shipowners have insisted upon this stipulation, which is agreed to by the shippers, namely, that any consequences of neglect or default whatsoever of the master or any other servants of the company in navigating the ship shall be excepted from this liability. By this bill of lading, therefore, not only is collision excepted, but any loss caused by the negligence of the master or mariners of the carrying ship is excepted; and, therefore, under this bill of lading that liability which was held to exist against the shipowners in *Lloyd* v. *General Iron Screw Collier Co.* (1) is negatived, and the defendants cannot be held liable for the loss caused by the negligence of their servants on board the navigating ship, whether or not that loss is the immediate result of a collision or not. Therefore under this bill of lading the plaintiffs cannot rely upon the implied contract on the part of the shipowners, that the goods shall be carried with reasonable care and skill by their servants. There are liabilities on the part of the shipowner which would well exist under a bill of lading in this form, as for instance, if any personal negligence of his could be proved to be the real cause of the loss. If he employs as master of the ship a person who was known to be of drunken habits, and it is shewn that the collision or loss is the result of the drunkenness of the captain on a particular occasion, that I should say would be personal negligence on the part of the shipowner, and he would be liable. Or if in order to favour some relation of his own he appoints as master of the ship a person who has not reasonable knowledge, skill, and capacity, and if the loss is shewn to have resulted from that want of reasonable knowledge, skill, and capacity, the shipowner would be liable. Or if the shipowner gives written instructions to his captain that upon the vessel entering into a certain

(1) 3 H. & C. 284; 33 L. J. (Ex.) 269.

port, although he should have a pilot before entering that port, he is not to have one on board, and by reason of his not having a pilot the ship be lost, there would be negligence on the part of the shipowner, and he would be liable. But a loss by the negligence of the master and crew of this ship is excepted, and the shipowner is not liable for it. It has been argued that nevertheless the defendants are liable for this loss, because it was partly caused by the negligence of their servants on board another ship, that is, on board the *Atjeh*, and that that negligence is not covered by the exceptions in this bill of lading. It is true that that negligence is not covered by the exceptions in this bill of lading, but the question is, whether under this bill of lading the owners of this ship, the *Crown Prince*, have undertaken anything with regard to the negligence or the reasonable care and skill of any servants of theirs on board another ship. That depends on whether there is any implied contract in this bill of lading that their servants on board another ship should exercise reasonable care and skill with regard to the navigation of that other ship. If there is such a contract it must be an implied contract, for there is no express contract with regard to the conduct of the defendants' servants on board another ship. How can such a contract be implied? A thing can be implied only when it can be assumed that both parties at the time of making the contract must have considered the matter which is to be implied and come to the same conclusion about it. It seems to me wholly unreasonable to suppose that at the time of making the contract in this bill of lading, which is a contract, not to carry the goods generally, but to carry them in a specific ship and deliver them after having carried them in that ship, the parties were considering the conduct of the shipowners' servants on board another ship which would not have anything to do with the carriage of these goods. Therefore it seems to me impossible to imply a contract or stipulation in this bill of lading with regard to the conduct of the shipowners' servants on board another ship. It is true that the conduct of those on board the other ship is not within the exception, but on the other hand, it is true that their conduct is not within the contract at all, and it seems to me that the shipowners cannot be held liable in respect of a contract to carry on board one

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

ship for the conduct of servants of theirs on board another ship, with regard to which ship alone complaint is made. Therefore it seems to me that in so far as the plaintiffs rely upon the contract to carry and deliver safely, inasmuch as they are bound to rely upon the contract in the bill of lading, they cannot recover against the defendants for a loss by negligence of the servants of the defendants on board the other ship, the *Atjeh*. The plaintiffs could recover for the negligence of the master and crew on board the carrying ship, the *Crown Prince*, if it was not for the exceptions, but the exceptions have in this case covered that loss. The exceptions absolve the defendants from the consequences of anything that occurred under the bill of lading.

Nevertheless a further question arises whether the defendants may not be liable in the other form in which this action is brought, namely, whether they may not be liable in tort, or in the form of an action on the case, for the negligence of their servants on board the *Atjeh*, the jury having found that the collision was caused in part by the negligence of those on board the *Atjeh*, so that without their negligence the loss would not have happened. In answer to that it was suggested that the ships were both Dutch ships, and that although there was a loss by reason of the negligence of the servants of the defendants on board the *Atjeh*, yet by Dutch law the defendants are not liable, and that we are bound to administer Dutch law. Now that raises two questions: First of all were these Dutch ships, or rather (which is more material), was the *Atjeh* a Dutch ship? and secondly, if they were Dutch ships, or the *Atjeh* was a Dutch ship, nevertheless is it true to say the defendants are not liable in tort in this action? Now I am of opinion that neither of these ships was Dutch, but that both of them were English ships, at least for the purpose of considering whether any liability attaches according to English law to the defendants. I will treat them from the same point of view, for they both were registered in Holland according to Dutch law, and they both carried the Dutch flag. The circumstances relating to these ships were of the following kind. The defendants are an English joint stock company, limited, composed of English shareholders, and of English shareholders alone. For the purpose of carrying on a particular trade it was necessary that the company should be

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

registered in Holland, and consequently this company obtained first of all a registration of themselves as a company in Holland, the shareholders being the same, and they then had their ships registered in Holland; but the Dutch company had no power to deal with the ships. Every appointment with regard to the ships was made by the English company. The captain no doubt was a Dutchman, but he was the servant of the English company, paid by them, owing obedience to their orders, acting for them, the ship being employed solely for their benefit, and the Dutch company not being enabled to obtain anything by the working of the ship. The ship therefore being worked for the benefit of the English company, and being conducted by servants of the English company, the question is, whether the mere fact of obtaining a register in Holland and carrying the Dutch flag makes her a Dutch ship. It is absurd to suppose that the mere fact of carrying the Dutch flag makes her a Dutch ship. Pirates carried the flag of every nation, but they were hanged by every nation notwithstanding. To carry false papers was an ordinary mode of evading the laws of war, but nobody ever supposed that the mere fact of carrying a foreign neutral flag and having papers of a foreign neutral country would cause the ship to be considered as the ship of the nation whose flag and papers she carried. Unless a ship be employed under letters of marque of Government, which make her become a ship of the Government, and by which letters of marque the Government undertake a responsibility as government, the nationality of a ship depends upon her ownership and upon that alone. The owners of this ship are an English company, the owners of this ship are Englishmen, and it seems to me that the mere fact of her being registered in Holland for the purpose of carrying on a Dutch trade, which however is to be carried on for the benefit of the Englishmen, and them alone, does not prevent her being a British ship. It seems to me, therefore, that both these ships were British ships. But it is suggested that they are not British ships, because they are not registered as British ships pursuant to the provisions of the Merchant Shipping Acts. The Merchant Shipping Acts of course cannot be applicable except to English ships and English owners. The legislature would not be entitled to legislate with regard to a foreign

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

ship. Therefore the question whether a ship is bound to be registered according to English law depends upon whether she is an English ship. If she belongs absolutely and entirely to English owners, she is an English ship before she is registered, and whether she is registered or not. It is true that she cannot obtain those advantages which are given to English ships by reason of the Merchant Shipping Acts in the Courts of this country, unless she is registered as such. But it has always been held, and it seems to me to be the law, that she cannot evade liability if she is a British ship by the mere fact of her owner omitting to register her as a British ship. It would be strange if it were otherwise, because in that event it would be for the advantage of British owners not to register their vessels. If it be true to say, for instance, that not to register a vessel prevents the owners from being liable for the acts of their own servants and captain, it would be for their advantage to omit to get their ship registered as a British ship. It seems to me that the nationality of a ship depends solely upon her ownership, and as to her liability it does not matter about her being registered. Therefore it seems to me on the question of fixing the defendants with liability for the negligence of the captain and crew of the *Atjeh*, who are admitted to be the servants of the defendants, that the defendants cannot escape liability by saying their ship was not registered as a British ship, but that she was registered as a Dutch ship. She was nevertheless an English ship, and the defendants are liable according to English law. But I will assume that both ships were Dutch ships: nevertheless, whatever might have been the Dutch law, if this case had been tried in Holland, it seems to me the defendants are still liable. The negligence on the part of the servants of the defendants did not take place in Holland, it did not take place within the sole territorial jurisdiction of a foreign country. This case is not like *The M. Moxham* (1), where the ship in Spain ran against a pier or quay in Spain. In that case, whatever the cause of action was, it arose entirely in Spain, and the action was an action in tort, and the well-known rule applies that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained

(1) 1 P. D. 107.

in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country. But the negligence complained of in this action took place upon the high seas, which is the common ground of all countries. Therefore that rule with regard to the exclusive jurisdiction of a foreign country does not apply. The case comes to this, whether an action for a tort committed on the high seas between two foreign ships (for I assume for this purpose that both are foreign ships) an action can be maintained in this country, although it is not a tort according to the laws of the Courts in that foreign country. From time immemorial, as far as I know, such actions have been maintained in the Court of Admiralty, and the rule of the liability of the shipowner for the acts of his servants has been invariably employed, and inasmuch as the rule of exclusive jurisdiction cannot apply, it seems to me that if a foreigner in this country can be served with a writ for an act of his servants done on the high seas, which are as much within the jurisdiction of England as they are within the jurisdiction of any other country, an action can be maintained in a Court of common law.

Therefore, even if I assume these to have been Dutch ships, it seems to me that, inasmuch as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England, but by the maritime law, which is part of the common law of England as administered in this country; and by the maritime law of England as administered in this country a shipowner is liable for the negligence of the master and crew of his ship. That seems to me to have been distinctly stated in the cases of *The Milan* (1) and *The Leon* (2), and as far as I know it has been the invariable practice of the Court of Admiralty. Therefore, it seems to me that these defendants are liable for the negligence of the master and crew as their servants of their ship, the *Atjeh*, even if she was a Dutch ship.

(1) 1 Lush. 388; 31 L. J. (Ad.) 105. (2) 6 P. D. 148.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Brett, L.J.

But then the jury have found that this loss was the consequence or result of the combined negligence of the servants of the defendants on board the *Crown Prince*, and of their servants on board the *Atjeh*. If these ships had belonged to different owners, the loss of the cargo on board one of them being the result of negligence on the part of both, so that without the negligence on the part of both there would have been no loss, then, according to the case of *The Milan* (1), the owners of each of the two ships would have been bound to pay in the result half of the loss which was claimed. The result would be this, that the defendants would be liable for half the loss as a consequence of the negligence of those on board the *Crown Prince*, and for half the loss as a consequence of the negligence of those on board the *Atjeh;* and if both the ships had been arrested by the process of the Admiralty Division, and if there had been no exception in the bill of lading as to negligence of the crew of the *Crown Prince*, the judgment would have been that the damages should be recovered half by the sale of the ship, the *Crown Prince*, and half by the sale of the ship, the *Atjeh;* but inasmuch as the defendants are exempted by the exception in their bill of lading from the consequence of the negligence of their servants on board the *Crown Prince*, they would have been relieved in the Admiralty Court from the consequence of that negligence, namely, from the sale of the *Crown Prince* to recover half the loss. They would have been relieved from that half of the loss by the exception in the bill of lading. But by the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9, in this action in the High Court of Justice where the rules of the Admiralty Court and the Common Law Courts are different, the rule of the Admiralty is to be followed. Therefore the same result follows in this action, namely, that although if there were no exception as to negligence the defendants would be liable for half this loss by reason of the negligence of their servants on board the *Crown Prince*, and for half the loss by reason of the negligence of their servants on board the *Atjeh*, they are by reason of the exception in the bill of lading relieved from the consequence of the negligence of their servants on board the *Crown Prince*, that is, for half the loss, but they are not

(1) 1 Lush. 388; 31 L. J. (Ad.) 105.

relieved from the consequences of the negligence of their servants on board the *Atjeh*, and for that amount therefore the defendants are liable. The appeal therefore succeeds as to one part and fails as to the other. It seems to me, therefore, there should be no costs of the appeal, but that the plaintiffs having recovered in the action are entitled to the costs of the action.

I wish to state one matter with regard to shipowners. If shipowners in general, or if shipowners in a particular trade, were to venture to draw up bills of lading in a form which would absolve them from responsibility for their own personal negligence or for their own personal want of reasonable care and skill, on the application of shippers of goods, an Act of Parliament would probably be passed such as that which was passed by the legislature to put down a similar attempt on the part of the railway companies to escape from liability—I mean the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.

LINDLEY, L.J. This in an appeal by the defendants from the judgment of Pollock, B., and Manisty and Stephen, JJ., reported in 9 Q. B. D. 118.

The facts are not in dispute, and are stated in the report referred to. In addition, however, to the facts there mentioned it was stated to us that the two ships were registered in Holland in the name of a Dutch company composed of the same persons as the English company, who are the defendants. The Dutch company was in fact a bare trustee of the ships for the defendants; and the object of forming the Dutch company and of having the ships registered in Holland in the name of that company was to enable the defendants to trade with those ships to Java, which is a Dutch possession. The counsel for the defendants, whilst denying all liability on the part of the Dutch company, waived any advantage which might be taken of the fact that the Dutch company was not in form a party to this action, and admitted that for all the purposes of this action the defendants represented the Dutch company. The Court below decided in the plaintiffs' favour on the ground that the contract contained in the bill of lading was governed by English law, and not by Dutch or Dutch Indian law, and upon the further ground that according to English law

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Lindley, L.J.

the defendants were liable for a breach of the contract to carry contained in the bill of lading. In this view of the case it became unnecessary to consider the liability of the defendants irrespectively of the contract. Nor did the Court below express any opinion upon that point.

The decision of the Court below as regards the law applicable to the case appears to me correct. The parties to the contract were English, although the master who signed the bill of lading was a Dutchman. The contract was in the English language, and was made at Singapore, which is an English port, and where English law prevails. The ship sailed under the Dutch flag, and was bound to a Dutch port, and was commanded by a Dutch captain. As regards the privileges of trade which the ship might enjoy as a Dutch ship in Dutch ports, the parties no doubt relied on the Dutch law, but as regards the construction and effect of the contract itself as between the plaintiffs and the defendants there can I think be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd* v. *Guibert* (1), but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French; the lex loci contractus was Danish; the ship was French; her master was French and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different and so is the inference to be deduced from them. The lex loci contractus was here English and ought to prevail unless there is some good ground to the contrary. So far from there being such ground the inference is very strong that the parties really intended to contract with reference to English law.

In order to determine the effect of the contract according to

(1) Law Rep. 1 Q. B. 115.

English law, it is necessary to ascertain its true meaning, and in particular the extent of the express exception of collision from the liability undertaken by the defendants. If the word "collision" means every collision however caused, then the defendants, having expressly stipulated against liability for collision, are not liable for a breach of their contract to carry. Again, if the word "collision" means every collision, except a collision caused by the negligence of those engaged in carrying the goods, then the defendants, having expressly stipulated against liability for collision, even though so occasioned, are not liable for any breach of their contract to carry. But if the word "collision" means collision not occasioned by any negligence of the defendants or their servants, then the defendants will not have excluded their liability for damage by all collisions, but only for such as may have been occasioned by any negligence of themselves or their servants in the navigation of the carrying ship; they will not have excluded their liability for damage by collision occasioned by the negligence of themselves or their servants otherwise than in the navigation of the carrying ship. If the word "collision" means what is now supposed it will follow that in the events which actually happened the defendants will be liable for a breach of their contract to carry. For their contract is to carry safely except in the excepted cases; and upon the present supposition the case which has arisen will not be one of them. The contract in this case is contained in a bill of lading. The contract has reference to a particular ship, viz., to the ship on board of which the goods are to be put. The goods are to be delivered on the safe arrival of that ship; and the conditions and exceptions contained in the bill of lading all have reference to the voyage of that ship and to her captain and crew. The first set of exceptions includes collision and perils, dangers and accidents of the sea. The second exception extends to loss or damage from any act, neglect, or default of the master mariners or other servants of the company in navigating the ship. The carriage of the goods on board the ship referred to in the bill of lading is the subject to which the contract refers, and in construing it this must be borne in mind. As a mere matter of construction I should come to the conclusion that the word

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Lindley, L.J.

"collision" in the bill of lading meant every collision between the carrying ship and any other; but that inasmuch as the word collision alone would not or might not extend to collisions occasioned by the negligence of those in charge of the carrying ship, additional words were inserted to cover even this case. Certain authorities, however, were referred to for the purpose of shewing that the word "collision" does not extend to collisions occasioned by the negligence of the carrier or his servants. But the authorities referred to do not go this length; they are all confined to negligence on the part of those who are in charge of the goods to be carried. The word "collision" as construed in those cases was restricted, but only so far as the true construction of the whole contract required. We are now asked to restrict it further, and as it appears to me to an extent not warranted by the rest of the contract or by the authorities. On the one hand care must be taken not to confine a general principle to cases which merely illustrate its application; but on the other hand care must be taken not to apply decided cases so as to defeat the real object and meaning of persons when expressed in sufficiently plain language. The introduction of the word "collision" in addition to risks and dangers of the sea, shews that something was intended to be excepted which those words would not or might not themselves include. But such expressions as perils of the sea, accidents or damage of seas, and the like, in charter-parties and bills of lading have been long held to extend to collisions not occasioned by the negligence of the master or crew of the carrying ship: *Bullen* v. *Fisher* (1); and on the other hand, such expressions have been held not to apply to collisions occasioned by such negligence: *Lloyd* v. *General Iron Screw Collier Co.* (2); *Grill* v. *General Iron Screw Collier Co.* (3) So an exception of "leakage and breakage" has been held not to include leakage or breakage caused by the carelessness of the shipowner or his servants in stowing: *Phillips* v. *Clark* (4); *Czech* v. *General Steam Navigation Co.* (5); see also *The Chasca.* (6)

11 QBD 49

(1) Abbott on Shipping, 11th ed., p. 341.
(2) 3 H. & C. 284. 10 Jur N S 661
(3) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.
(4) 2 C. B. (N.S.) 156.
(5) Law Rep. 3 C. P. 14.
(6) Law Rep. 4 A. & E. 446.

Having regard to these decisions, the introduction of the word "collision" into the bill of lading in this case would not exonerate the defendants from liability in respect of a collision caused by the negligence of their servants, who had charge of the ship in which the plaintiffs' goods were being carried; but this liability is expressly excluded by additional words. These additional words were probably inserted to meet not only the decisions referred to, but also the more general observations of several eminent judges to the effect that the shipowner cannot protect himself from liability for the misconduct of his servants by the use of general words only: see per Kelly, C.B. (1); per Willes, J. (2); per Lush, J. (3) In truth, it is the application of this principle which gives rise to the difficulty which the Court has to solve. The plaintiffs themselves invoke this very principle, and rely upon it, and contend that the general word "collision" is not sufficient to protect the defendants from liability for the negligence of their servants whether in the management of the carrying ship or any other. This, moreover, is the view taken by the Court below. The answer to it is that the meaning of the parties must be gathered from the whole contract, and that all the exceptions taken together shew that what the parties really intended was to exclude all collisions even although attributable to the negligence of those who were intrusted with the carriage of the plaintiffs' goods. This intention might no doubt have been expressed more plainly, but the closer the course of decisions on this subject is studied the more plain does it I think become that the real meaning of the parties was as above stated. I am aware that in questions arising on bills of lading and charterparties the rule is to regard the causa causans rather than the causa proxima, and that there is a difference in this respect between such documents and policies of insurance. But this rule is after all subordinate to the true construction of the contract, and ought not to be applied so as to defeat the intention of the parties as therein expressed. For example, if the *Atjeh* had been owned by strangers, and the collision had been caused wholly by the negligence of her

(1) Law Rep. 3 C. P. 481. (2) Law Rep. 3 C. P. 19.
(3) Law Rep. 9 Q. B. 549.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Lindley, L.J.

captain, the loss of the plaintiffs' goods would, as between them and the defendants, be regarded as a loss by collision within the true meaning of the bill of lading and not as a loss by an unexcepted peril, viz., the negligence of the captain of the *Atjeh*. This illustration shews that the liability of the carrier turns on the true construction of the contract, and that the distinction between causa proxima and causa causans is not the test of liability. The word "collision" may cover both or only the first according to the meaning of the parties as expressed in the contract. For the above reasons I am unable to concur in the view taken by the Court below that the defendants are liable on the contract, i.e., for a breach of their contract to carry safely.

It becomes therefore necessary to consider whether the defendants are liable to the plaintiffs for the loss of their goods apart from the contract into which the parties entered by the bill of lading. It is contended that because both ships were registered in Holland in the name of a Dutch company, and were both lawfully sailing under the Dutch flag, and came into collision on the high seas, the plaintiffs' rights, apart from the contract, must be decided by Dutch law. But although both ships may have been Dutch, and entitled by the law of Holland to trade with Dutch ports in Java, yet it is not to be forgotten that both ships were in fact owned beneficially by the defendants, and were both navigated by persons who were, in fact, the servants of the defendants. What then is the law applicable as between the plaintiffs and the defendants to a loss of the plaintiffs' goods occasioned by a collision between these two ships? What reason is there for saying that Dutch law as distinguished from English law or the general maritime law is to govern such a case? The reason alleged is that each ship being Dutch, the law of the flag, i.e., the Dutch law, regulates the persons on board each ship, and determines the rights and liabilities of her owners both towards the captains and crews, and towards the owners of the cargoes on board. This reason is based on a very common and fruitful source of error, viz., the error of identifying ships with portions of the territory of the States to which they belong. The analogy is imperfect and is more often misleading than the reverse, as I

have endeavoured to point out before: *Reg.* v. *Keyn.* (1) In this particular case the analogy appears to me more misleading than usual. I am not aware of any decision in this country to the effect that where two ships come into collision on the high seas the rights and liabilities of their respective owners have been held to depend on the laws of the respective flags of the ships. The law applicable in this country to cases of collision on the high seas is the maritime law as administered in England and not the laws of the flags: see *The Johann Friederich* (2); *The Leon* (3), and Foote on Priv. International Law, pp. 398 and 403. According to the maritime law, the defendants as principals of the captain of the *Atjeh*, are clearly liable for the consequences of his negligence. If it be objected that the Dutch company and not the defendants are the owners of the *Atjeh*, and responsible for the acts of her captain, the objection is answered by the admission made by the defendants' counsel in this Court that the defendants represent the Dutch company for all the purposes of this action. Probably, even without this admission, the result would be the same considering that the Dutch company were bare trustees for the defendants. But the admission gets rid of all difficulty with respect to ownership such as had to be encountered in *General Steam Navigation Co.* v. *Guillou.* (4)

Assuming then that the defendants are liable to the plaintiffs for the loss occasioned by the negligence of the master of the *Atjeh*, it is necessary to determine the amount of damages to which the plaintiffs are entitled. The action viewed as an action of tort appears to come distinctly within s. 25, sub-s. 9, of the Judicature Act, 1873; and the rules of the Admiralty Court have to be ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *Thorogood* v. *Bryan* (5) and other cases of that class; for the Admiralty Court has never adopted that doctrine: see *The Milan.* (6) According to the rules of the Admiralty Court, if the two ships had belonged to different owners, then as both ships were to blame the plaintiffs

(1) 2 Ex. D. 93, 94.
(2) 1 Wm. Rob. 35.
(3) 6 P. D. 148.
(4) 11 M. & W 877.
(5) 8 C. B. 115.
(6) 31 L. J. (Ad.) 105; Lush. 388, 403; 5 L. T. (N.S.) 590.

1883

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

Lindley, L.J.

would have been entitled to recover one-half of the amount of their loss from the owners of the *Atjeh* and one half from the owners of the *Crown Prince:* see *The Milan.* (1) As both ships belong to the same owners, the above rule would render the defendants liable for both halves, i.e., for the whole of the loss, and this would be the proper result, were it not for the special stipulation contained in the bill of lading and which exonerates the defendants from the share of the loss attributable to the negligence of those in charge of the *Crown Prince.* The contract in this case exonerates the defendants from half of the loss and leaves them liable for the other half; and the plaintiffs are entitled to judgment on this footing. Unless the parties can agree upon the sum for which judgment is to be entered, the amount must be ascertained by a reference to a master or a referee. The plaintiffs will be entitled to the costs of the action, but the appeal having been to a great extent successful, each party should pay his own costs of the appeal.

BAGGALLAY, L.J., concurs in the above judgment.

Judgment varied.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Lovell, Son, & Pitfield.*

(1) 31 L. J. (Ad.) 105; Lush. 388, 403; 5 L. T. (N.S.) 590.

J. E. H.

[IN THE COURT OF APPEAL.]

1883
March 6.

BELL AND ANOTHER *v.* LOVE AND ANOTHER.

Inclosure — Reservation of Minerals — Mines — Manorial Rights — Support — Damage to Surface—Compensation.

By an Act for inclosing a moor, being the waste of a manor, the commissioners were directed to allot the residue of the moor amongst the owners of every separate ancient dwelling-house within the manor, having a right of common thereon. It was also enacted that after the allotments were made, all right of common upon the moor should cease, and the allotments should be held by the same tenure and estates as the dwelling-houses, and that the lords of the manor and all persons claiming under them should hold and enjoy all "mines, power of using or granting wayleave . . . . to the owner or owners of the said manor . . . . incident, appendant, and belonging or appertaining . . . . in as full, ample, and beneficial manner to all intents and purposes, as they could or might have held and enjoyed the same in case this Act had not been made." The Act contained a proviso, whereby it was enacted that in case the lords of the manor or any person claiming through them should work any mines lying under any of the allotments, or should lay, make, or use any way over any of the allotments, "such person or persons so working such mines, or laying, making, or using any such way or ways, shall make satisfaction for the damages and spoil of the ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled" by arbitration "and not to exceed the sum of 5*l.* yearly during the time of working such mines, or continuing or using such way or ways, for every acre of ground so damaged or spoiled."

In 1772 an allotment was made to P. under the provisions of the above-mentioned Act. No house then stood upon the allotment; but a house was built upon it before 1826, which was altered and enlarged in 1854 and again in 1877. The plaintiff S. was the owner of the house and successor in title to P.: the plaintiff B. was the occupier under a lease for twenty-one years from the 28th of November, 1876. The defendants were lessees from the lords of the manor of the coal-mines, fire-clay, and minerals under portions of the waste allotted under the Inclosure Act above-mentioned, and in 1877 began to work the coal in that portion of the mines which underlay the plaintiffs' house, and removed all the coal from under it without leaving any support for the roof of the mine. In consequence the surface of the land subsided, and the house was damaged to an amount exceeding the sum recoverable under the proviso in the Act above-mentioned. This mode of working a mine was usual and proper in the district where the mines were situate, and the mines were skilfully worked. The land on which the plaintiffs' house stood would have been let down, whether there was any house on it or not:—

Held, that the plaintiffs were entitled to have their house supported by the mines and minerals comprised in the lease to the defendants, and that the

1883

BELL v. LOVE.

defendants were liable to pay to the plaintiffs compensation beyond that mentioned in the Inclosure Act above referred to.

Held, further, by Lindley, L.J., that even if the defendants had, by virtue of the Inclosure Act, a right to let down the surface, nevertheless, the plaintiffs' house having stood for more than twenty years, they were, by virtue of the principles laid down in *Dalton* v. *Angus* (6 App. Cas. 740) entitled to a right of support for it.

SPECIAL CASE, in an action commenced on the 16th of January, 1880, stated under an order of Court, whereby it was directed that if the judgment of the Court should be in favour of the plaintiffs, then, unless the parties should agree upon the amount for which judgment should be enforced, the matter should be referred to an arbitrator.

The action was commenced by the plaintiff Bell alone, but during the argument in the Court of Appeal it was agreed that the plaintiff Salvin should be added as a party. The material parts of the special case, as amended, were as follows:—

1. The plaintiff, M. C. Salvin, is the owner, and the plaintiff, C. E. Bell, is the occupier and tenant of a dwelling-house, land, and premises, now known as Park House, under the indenture in the next paragraph mentioned. The defendants are colliery-owners, and have under the circumstances hereinafter mentioned worked the coal underlying the plaintiffs' land and part of the house. The removal of the coal by the defendants has allowed the house and the land on which it stands, and the lands adjacent thereto in the occupation of the plaintiff Bell to subside to some extent, and owing to such subsidence the house has been cracked and damaged.

1A. By an indenture, dated the 28th of November, 1876, being an indenture of settlement made upon the then intended marriage of the plaintiff Bell with Teresa Salvin, daughter of the plaintiff Salvin (which marriage was shortly afterwards solemnized), the plaintiff Salvin demised unto M. H. Salvin and E. G. Marshall the said dwelling-house and premises, then known by the name of Elvet Cottage, for the term of twenty-one years from the 28th of November, 1876, at the yearly rental of 5*s*., in trust for the plaintiff Salvin until the intended marriage, and after the solemnization thereof in trust for the plaintiff Bell during the lives of him and Teresa Salvin, and after the death of either of them in

trust for the survivor. The plaintiff Bell covenanted with the plaintiff Salvin to keep the premises in repair, reasonable wear and tear excepted.

2. The land on which the house now stands, and a large extent of the surrounding and adjacent land, at the time of passing the Inclosure Act hereinafter mentioned formed part of the moor or waste of the manor of Elvet in the county of Durham. At the time of the passing of the Inclosure Act and for several centuries prior thereto the Dean and Chapter of Durham in right of their cathedral church were lords of the manor of Elvet, and as such were seised of and entitled to the mines, coal-mines, fire-clay, and minerals lying in and under the manor and the moor and waste, certain persons (including Thomas Phillipson hereinafter mentioned) being entitled in respect of the several ancient freehold or leasehold dwelling-houses within the manor to certain rights of common upon the moor and waste.

3. In the year 1772 the moor and waste were allotted, divided, and inclosed by an award made in pursuance of an Act of Parliament passed in 11 Geo. 3, intituled, "An Act for dividing and enclosing the moor or common called Elvet Moor, in the parish of St. Oswald in the county palatine of Durham, and for extinguishing all right of common in certain enclosed inter-common lands in the said parish." In this Act it was, amongst other matters, recited that certain persons (including Thomas Phillipson), "or their respective trustees, lessees, farmers, or tenants, in respect of, or as appendant, appurtenant, or belonging to their several ancient freehold or leasehold dwelling-houses within the said manor, barony, and borough, are intituled to right of common in or upon the said moor or common." It was then amongst other things enacted that the commissioners should set out and allot unto the dean and chapter two plots of ground, parcel of the moor or common lately by them inclosed and planted with young trees, with a private carriage road, and certain wells or springs of water and the ground around them, and the commissioners were "in the next place to set out, allot, apportion, and divide the residue of the said moor or common by proper stakes, metes, and landmarks, unto and amongst the several persons having a right of common thereon in manner

1883

BELL v. LOVE.

following (that is to say), to the owner or owners of every separate ancient dwelling-house within the said manor an equal portion in value of the said moor or common."

The Act contained a provision for making an award.

"And it is hereby further enacted, that immediately after finishing the said division and allotments and the execution of the said award or instrument all right of common upon the said moor or common shall cease and be extinguished, and the lots and parcels of land so to be allotted as aforesaid shall be held and enjoyed by the persons to whom the same shall be so allotted respectively in the same manner and by the same tenure, estates, and terms of years, as the respective dwelling-houses in right of and for which the said lots or parcels of land shall be so allotted are now holden."

"Provided also, and it is hereby further enacted, that nothing in this Act contained shall prejudice, lessen, or defeat the right, title, and interest of the said dean and chapter and their successors of, in, or to the royalties incident or belonging to the said manor, barony, and borough of Elvet, but that the said dean and chapter and their successors and all and every person or persons claiming under or in trust for them as owners of the royalties of the said manor, barony, or borough, and all succeeding owners thereof for the time being, shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony, or borough incident, appendant, and belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be inclosed as aforesaid) in as full ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made.

"Provided also, and it is hereby further declared and enacted, that in case the said dean and chapter or their successors or any person or persons claiming under them, shall after such division made as aforesaid work any mines lying within or under any of the said allotments so to be made, or shall lay, make, or use any

way or ways in, through, over, or along any of the said allotments or any parts thereof, then and in any of the cases so happening such person or persons so working such mines, or laying, making, or using any such way or ways shall make satisfaction for the damages and spoil of the ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled by two indifferent persons to be nominated and appointed to settle and ascertain the same, one of them to be nominated and appointed by the person or persons so working such mines, or laying, making, or using any such way or ways, and the other of them to be nominated and appointed by the person or persons who shall be in possession of such ground at the time or times of such damage or spoil being made, and such satisfaction not to exceed the sum of 5*l.* yearly during the time of working such mines, or continuing or using such way or ways, for every acre of ground so damaged or spoiled."

4. The land in the occupation of the plaintiff Bell (including the land on which his house now stands), was by the award made under and in pursuance of the Inclosure Act set out and allotted in 1772 to Thomas Phillipson therein-mentioned in full for his equal proportion in value in respect of an ancient freehold tenement or dwelling-house of Thomas Phillipson then situate in the manor of Elvet. The plaintiff Salvin is the successor in title as regards the land of Thomas Phillipson.

5. At the time of passing the Inclosure Act and at the time of making the award no house or other building had been erected or stood upon the lands allotted to Thomas Phillipson, or upon the moor or waste.

6. At some time prior to the year 1826, a dwelling-house was built on the land and on part of the site occupied by the plaintiff Bell's house. In the year 1836 the dwelling-house contained four or five rooms, and prior to that date (but when prior thereto was not proved) a barn had been built in the rear of the dwelling-house. Otherwise than as aforesaid, there was no evidence to shew the date at which the dwelling-house was built. Shortly prior to the year 1854 the then tenant of the dwelling-house added a drawing-room and two bed-rooms to the north end, and

1883

BELL v. LOVE.

pulled down the barn, and built a kitchen and other rooms over the kitchen on the site previously occupied by the barn. From the last mentioned date until 1877 no substantial alterations were made to the dwelling-house and premises.

7. At the commencement of the plaintiff Bell's tenancy the dwelling-house was in good and substantial repair. Shortly after the commencement of his tenancy he pulled down considerable portions of the dwelling-house, and partly on the site of that portion of the dwelling-house which had been pulled down, and partly on land which before then had not been built upon, erected and built a portion of the house in respect of the damage to which the present action was brought. At the same time the plaintiff Bell added considerably to the height and length of that portion of the dwelling-house which had been pulled down by adding additional rooms thereto, and also altered the position of the front door and of certain windows. Such alteration and additions, on which the plaintiff expended a considerable sum, were well and substantially carried out.

9. Underlying the manor of Elvet in the Inclosure Act mentioned were certain valuable seams and mines of coal, fire-clay, and other minerals, some portions of which had been worked by the lessees of the dean and chapter since a date prior to the year 1623 without leaving any support for the surface.

10. At the time of passing the Inclosure Act there were no mining or manorial customs in the manor of Elvet which enlarged, restricted, or cut down the common law rights of the dean and chapter, as lords of the manor, and their lessees to search for, win, work, and carry away the coals and other minerals in and under the open commons and wastes of the manor.

11. On the 4th of June 1870, a lease of the coal-mines, fire-clay, and minerals was granted by the then dean and chapter of Durham (in whom were then vested all the estate and interest in the said mines, fire-clay, and minerals, and the rights to win, work, get, and carry away the same, of the dean and chapter in the Inclosure Act mentioned), to Joseph Love. The coal mines and minerals comprised in the lease underlie in part certain ancient freehold lands of the dean and chapter of Durham, and in part

certain portions of the moor and waste directed to be inclosed and allotted by the Inclosure Act.

12. In the year 1875 the defendants became entitled to the interests and rights of Joseph Love under the lease, and before the defendants worked or excavated the mines under the house and land of the plaintiffs, or under any land adjacent thereto, or carried away any coal or fire-clay therefrom, all the rights and privileges to work, get, and carry away the coal and fire-clay granted to Joseph Love and his assigns under the lease had vested in the defendants, and thence hitherto remained vested in them.

13. In the year 1877 the defendants, as lessees of the mines, commenced to work the coal in that portion of the mine which underlay the plaintiffs' house and land and the land adjacent thereto. In the course of such working the defendants removed all the coal from under the house and from under part of the plaintiffs' land, without leaving any support for the roof of the mine. Owing to the coal having been removed, the strata between the mine and the surface of the land overlying such workings, and also such surface, subsided to some extent, and the house was thereby damaged to an amount exceeding the sums paid into Court as hereinafter mentioned. The surface of the land would have subsided in consequence of such working whether there had been any house upon it or not.

14. The method of working the mine adopted and pursued by the defendants is and has been for a great number of years the usual, proper, and customary method adopted and pursued in the district where the mine is situate, and in the counties of Durham and Northumberland, in all cases where the owner or lessee of the mine is or was entitled to work the mines into what is known in the counties of Durham and Northumberland as "goaf," that is, by winning, working, and carrying away all the coal from the mine without leaving any pillars of coal or other support for the roof of the mine or for the support of the surface. The working plans of the defendants' colliery were inaccurate to some extent, and at the time when they worked the coal under the plaintiffs' house and land, they supposed that they were at some distance therefrom; but there was no evidence to shew that the defendants would have adopted or pursued any other system of working if

1883

BELL v. LOVE.

they had been aware of the true situation of their workings with regard to the plaintiffs' house and land. With this exception the defendants worked the mine skilfully and carefully, and in a fair, proper, and orderly manner, and according to the best method of winning, working, managing, and carrying on of a colliery, coal mine, and veins or seams of fire-clay in the district wherein the mine is situate, and were not guilty of any negligence in the working of the mine or in the winning, working, getting, and carrying away of the coal and fire-clay therein.

15. Prior to the joining of the plaintiff Salvin as a plaintiff in this action, the defendants paid into Court the sum of 82*l.* 10*s.*, which, if their liability to the plaintiff Bell is (as they contend) limited to the full amount of the satisfaction or compensation mentioned in the last section or proviso of the Inclosure Act set out in the third paragraph of the special case, is sufficient to satisfy the claim of the plaintiff Bell.

15A. Since the plaintiff Salvin has been joined as a plaintiff, the defendants deny all liability to him in like manner as they deny their liability to the plaintiff Bell, but although denying such liability, in the alternative have paid into Court one shilling in satisfaction of his claim, if any.

The questions for the opinion of the Court are :—

1. Whether the defendants are liable to pay to the plaintiffs, or either of them, any, and if so what, compensation beyond that in the Inclosure Act mentioned.

2. Whether the plaintiff Salvin is entitled as against the defendants to have his house and land supported by the mines and minerals comprised in the lease above-mentioned.

3. Whether the plaintiff Bell is entitled as against the defenddants to have the house and land supported by the mines and minerals comprised in the lease.

The Queen's Bench Division (Manisty and Williams, JJ.), gave judgment for the plaintiff Bell, who was then, as is abovementioned, the only plaintiff in the action.

The defendants appealed.

1882. Dec. 8, 9. *Sir F. Herschell, S.G.*, and *F. M. White, Q.C.* (*John Edge*, with them), for the defendants. The question is

whether the plaintiffs are entitled to recover compensation to the amount of the actual damage sustained, or whether it is to be limited to the amount fixed by the compensation clause in the statute; but it is not merely a question of compensation, for if the plaintiffs are right, according to their contention they would be entitled to an injunction to prevent in the course of the mining the surface land being let down. Now, according to *Rowbotham* v. *Wilson* (1), regard must be had to the language of the Act of Parliament and the surrounding circumstances at the time when it was passed. There was a right of common over a large surface of land which yielded but little profit, and there were valuable mines belonging to the lords of the manor which were worked by them without leaving any support to the surface. As the whole was in the lords of the manor, they had a perfect right to let down the surface so long as they did not thereby interfere with the rights of common. Then by this Act, notwithstanding the allotments which were to be made under it, the right of the lords to the working of the mines was to remain as it existed before the Act, but if the contention on the part of the plaintiffs be correct, they can prevent the defendants, who stand in the position of such lords, from enjoying the rights to the mines which they had before the Act. The intention was that the mines should be worked as they had been before the Act, and therefore the lords would have a right to do so, though the effect of it might be to let down the surface land: *Smith* v. *Darby*. (2) There is no substantial difference between the present case and that of the *Duke of Buccleuch* v. *Wakefield* (3) as regards the reservation of the right of the lords. The terms of the compensation clause can make no difference, the only effect of it in that case was to make it reasonable that the lord should have power to let down the surface land in working the mines. The general right of the lord in the mines of waste land, subject to the custom of the manor, is clearly stated in Bainbridge on Mines, cap. 3, s. 3, 4th ed. p. 50. He may take gravel and the like in the waste so long as he does not infringe upon the commoners' rights: *Hall* v. *Byron*. (4)

(1) 8 H. L. C. 348. (3) Law Rep. 4 H. L. 377.
(2) Law Rep. 7 Q. B. 716. (4) 4 Ch. D. 667.

1883

BELL v. LOVE.

Charles Russell, Q.C., and *Ridley*, for the plaintiffs. The case of *Duke of Buccleuch* v. *Wakefield* (1) was decided on the ground that by the provisions of the Act full and complete compensation was given to the surface owner, which distinguishes that from the present case. Though the mines and minerals were reserved to the lords of the manor when the Act was passed, that would not enable them to work the mines to the destruction of the surface land, unless it was clearly shewn by the compensation clause or otherwise that it was intended they might do so: *Hext* v. *Gill* (2) and *Roberts* v. *Haines*. (3) An inclosure statute ought not to be construed so as to exclude the right to full compensation, unless that is taken away by express words. In *Rowbotham* v. *Wilson* (4) the language was different from that under consideration in the present case, for the proprietors accepted the allotments subject to the inconvenience which must arise from working the mines; and in *Smith* v. *Darby* (5) the compensation clause in the lease gave ample compensation to the lessor.

Further, the plaintiffs' house has stood for such a period of time, that they have gained a right of support for it by prescription.

Sir F. Herschell, S.G., in reply. The intention of the legislature in passing the Inclosure Act under consideration was to give proprietary rights to the commoners as to the surface, but not to diminish the rights of the lords of the manor as to the mines. The argument for the plaintiffs really comes to this, that the lords of the manor shall not work the mines. *Roberts* v. *Haines* (3) is not in point; for there it was conceded that the compensation clause related only to surface damage. *Duke of Buccleuch* v. *Wakefield* (1) is an authority in the defendants' favour; the only real difference is in the language of the compensation clauses, and that difference does not assist the plaintiffs. The allottees of the surface took it subject to the rights over it, whatever those rights might be.

Cur. adv. vult.

(1) Law Rep. 4 H. L. 377.
(2) Law Rep. 7 Ch. 699.
(3) 6 E. & B. 643; in Ex. Ch. 7 E. & B. 625.
(4) 8 H. L. C. 348.
(5) Law Rep. 7 Q. B. 716.

6 Jun 1885.

1883. March 6. The following judgments were delivered:— 1883

BELL v. LOVE.

BAGGALLAY, L.J. The defendants in this action are lessees under the Dean and Chapter of Durham of certain coal mines in the neighbourhood of that city. In the course of their mining operations, the defendants have worked the coal underlying a dwelling-house and lands, of which the plaintiff Salvin is the owner and the plaintiff Bell is tenant and occupier; such coal was worked without sufficient support being left for the roof of the mine; and, from want of such support, the surface subsided, and the house became cracked and damaged. In the present action the plaintiffs claimed damages in respect of the injury so sustained by them; and, the defendants having denied the right of the plaintiffs to have their surface lands supported and having insisted that they were entitled to get the coal underlying the plaintiffs' lands in the manner and by the method of working adopted by them, the questions of law arising in the action have been raised by a special case, finding the necessary facts. The special case was argued in the Queen's Bench Division, when judgment was given in favour of the plaintiffs. From that judgment the present appeal is brought.

The origin, as well of the present right of the plaintiffs to the surface, as of the present right of the defendants to the underlying minerals, is an award made in the year 1772 under an Inclosure Act passed in the 11 Geo. 3. At the time of the passing of that Act, the dean and chapter were lords of the manor of Elvet, in the county of Durham, within the limits of which manor there was a considerable tract of waste land, comprising about 400 acres, and commonly known as Elvet Moor or Common; over this moor certain persons, including one Thomas Phillipson, through whom the plaintiffs claim title, were entitled to rights of common in respect of *ancient freehold or leasehold dwelling-houses* held by them within the manor. The dean and chapter, as such lords of the manor, were owners of the soil of the moor, subject to the rights of the commoners, and were absolutely entitled to all the coal and other minerals underlying the manor. It would appear, though it is not expressly so found by the special case, that the owners of ancient dwelling-houses were the only commoners having rights of common over the moor, and that

1883

BELL v. LOVE

Baggallay, L.J.

such rights of common were limited to pasturage. The general scheme of the Act of Parliament was the inclosure and division of the moor, the allotment of certain portions of it to the commoners, and the extinguishment of all rights of common over it. I propose to consider in the first place the respective rights, at the time when the Inclosure Act was passed, of the dean and chapter as lords, and of the commoners, in respect of the working and getting of the minerals underlying the manor; and, in the next place, the effect of that Act as regards the minerals underlying the several portions of the moor which were allotted to the commoners.

The respective rights of the owners of surface lands, and of the owners of minerals underlying such surface, have of late years been the subject of much discussion, and it has been clearly established by a series of decisions, and particularly by the decisions of the House of Lords in the cases of *Rowbotham* v. *Wilson* (1), *Duke of Buccleuch* v. *Wakefield* (2), and *Buchanan* v. *Andrew* (3), that, although the primâ facie right of the owner of the surface is to have his surface supported, and the primâ facie right of the owner of the minerals to get them is limited to getting them in such a manner as not to occasion injury to the owner of the surface, such primâ facie rights may, nevertheless, be materially modified, to the extent even of authorizing the owner of the minerals to disturb or let down the surface, by contract between the respective owners, or those through whom they claim; and that it is immaterial whether such contract arises out of a covenant or reservation in a deed or out of the provisions of an Act of Parliament, giving legislative effect to arrangements come to, or presumed to have been come to, by the parties. In every case, however, in which the owner of the minerals claims any rights in respect of getting them in excess of, or other than, the primâ facie right of getting them without causing injury to the owner of the surface, the origin and the nature and extent of such rights must be clearly defined by some grant or equivalent assurance; in the absence of which the presumption is in favour of the right of the owner of the surface to support; it was held in the Exchequer

(1) 8 H. L. C. 348. (2) Law Rep. 4 H. L. 377.
(3) Law Rep. 2 H. L., Sc. 286.

Chamber, and afterwards on appeal in the House of Lords, in the case of *Bonomi* v. *Backhouse* (1) that such right of support is an ordinary right of the enjoyment of property, and not in the nature of an easement.

Now there is no trace or suggestion of any grant or other assurance of the minerals *underlying the ancient dwelling houses* within the manor of Elvet, which could confer upon the lords as owners of such minerals the right to disturb or let down the surface in getting them, and it has not been and cannot be disputed that the lords and their lessees would have been at the time of the passing of the Act responsible to the owners of the ancient dwelling-houses for any injury occasioned to them by getting such minerals. As regards, however, the minerals *underlying the moor*, the case at the time of the passing of the enclosure Act was different. The dean and chapter were owners of the surface as well as of the underlying minerals, but subject as to the former to the rights of common of the commoners. It has been contended, on behalf of the defendants, that the dean and chapter as owners of such minerals, or their lessees, were at liberty to get them in any manner they might think fit, and in so doing to let down the surface, provided they left sufficient pasturage for the commoners. This contention is, in my opinion, well founded; it appears to have been acted upon by the judges in the Queen's Bench Division; it is supported by the judgment of Lord Chelmsford in the *Duke of Buccleuch's Case* (2), and in the case of *Hall* v. *Byron* (3), Hall, V.C., held that the lord of a manor might remove the subsoil of the waste and apply it to his own use, provided he did not infringe upon the rights of the commoners, and that his right to do so was quite independent of his right of approvement under the Statute of Merton or at Common Law, and existed by reason of his ownership of the soil, subject only to the interest of the commoners; and further, that upon the question whether the subsoil has been removed to such an extent as to interfere with the rights of common, the onus probandi is on the commoners and not on the lord, as in the case of approvement. From the considerations to which I have

(1) E. B. & E. 622; 9 H. L. C. 503. (2) Law Rep. 4 H. L. 377.
(3) 4 Ch. D. 667.

(1) SC 4 Jur. NS. 1182; 5 Jur. NS. 1345; 7 Jur. NS. 809.

1883

BELL v. LOVE.

Baggallay, L.J.

adverted, it is clear that whilst, in respect of getting the minerals underlying the moor, the dean and chapter and their lessees had the right, at the time when the Inclosure Act was passed, to get such minerals in any manner they might think fit, provided they left sufficient pasturage for the commoners, their right to get the minerals underlying the other portions of the manor, including those underlying the ancient dwelling-houses, was limited to getting them in such a manner as to occasion no injury to the surface owners. There are, however, certain statements in the special case, which, for the reasons which I will mention presently, do not appear to me to affect the questions now under consideration, but which I am unwilling to pass over without comment, as they have been referred to and to some extent relied upon in the course of the arguments. It is found by the special case (paragraphs 9 and 14) that some portions of the coal and other minerals underlying the manor have been worked by the lessees of the dean and chapter since a date prior to the year 1623, without leaving any support to the surface, and that the method pursued by the defendants of working the coal underlying the lands of the plaintiffs (by which I presume is meant a method of working the coal by which the surface is disturbed or let down) had for many years been the usual, proper and customary method of working in the district in which the manor was situate. These statements were probably introduced into the special case with the view of putting them forward as evidence of a custom for the lords to work the minerals underlying the surface of the manor without leaving any support, and so as to let down the surface, and to do so without making compensation for the injury occasioned to the owner of the surface. The facts, however, thus stated fall far short of establishing the existence of any such custom as that suggested; there is no indication or suggestion as to the portions of the manor under which such workings had been carried on, or whether any portion of the surface had by reason of such working been disturbed or let down; a working under the moor would, as already pointed out, have been within the rights of the lord, even though the surface had been let down, provided the rights of the commoners had not been infringed, and it must be assumed that they had not, as the commoners had not complained. More-

over, as regards the coal underlying the surface of the manor other than the moor, such a custom would have been unreasonable and bad according to the decision in *Hilton* v. *Lord Granville* (1), a decision which, notwithstanding some doubts introduced by Lords Hatherley and Chelmsford in the *Duke of Buccleuch's Case* (2), has not, so far as I am aware, ever been overruled. It was followed in *Blackett* v. *Bradley* (3), the learned judges in that case feeling themselves bound by *Hilton* v. *Lord Granville* (1); but *Blackett* v. *Bradley* (3), which was decided in 1862, was not carried further. It is quite true that a dictum in the course of the judgment in *Hilton* v. *Lord Granville* (1), that a *grant by deed* to the like effect as the alleged custom would be unreasonable and bad, must be treated as overruled by the decisions in *Rowbotham* v. *Wilson* (4) and *Buchanan* v. *Andrew* (5), though in neither of these cases was *Hilton* v. *Lord Granville* (1) referred to, either in the course of the arguments or in the judgments. If it were necessary for me to express an opinion with reference to the decisions in *Hilton* v. *Lord Granville* (1) and *Blackett* v. *Bradley* (3) it would be to the effect that they were rightly decided. The reason why the custom should be held unreasonable and bad, whilst a grant to the like effect should be upheld, may well be that suggested by Blackburn, J., in *Blackett* v. *Bradley* (3), "that though the parties may legally *have made* such a contract, it would not be reasonable *to presume* that they had done so." As regards the minerals underlying the moor, the right of the lords to get them in a way that would let down the surface depended upon their ownership of the surface and not upon any custom. We have also the statement in paragraph 10 of the special case that at the time of the passing of the Inclosure Act there were no mining or manorial customs in the manor of Elvet which enlarged, restricted, or cut down the common law rights of the dean and chapter as lords of the manor, or their lessees, to work the coals and other minerals in and under the open commons and wastes of the manor.

Such then being the respective rights, at the time when the

(1) 5 Q. B. 701.
(2) Law Rep. 4 H. L. 377.
(3) 1 B. & S. 940.
(4) 8 H. L. C. 348.
(5) Law Rep. 2 H. L., Sc. 286.

1883

BELL v. LOVE.

[Baggallay, L.J.

Inclosure Act was passed, of the dean and chapter and of the commoners in respect of the getting of the minerals underlying the manor, we have next to consider the effect of that Act as regards the minerals underlying the several portions of the moor which were allotted to the commoners.

Now the Act which we have to examine is one by which the dean and chapter, as owners of both the surface of the moor and the underlying minerals, part with their interest in the surface, reserving to themselves the minerals, with power to get them; and the current of authority is clear that if, in such a case, the original owner of both intends to retain to himself the power of destroying the surface in getting the minerals, it is essential that the intention of the legislature should be expressed in language as to which there can be no reasonable question or doubt. Thus in *Rowbotham* v. *Wilson* (1) the award under the Act of Parliament contained a clause, which the House of Lords construed as equivalent to a grant, that the mines should be worked and gotten without any molestation, denial, or interruption by the owners of the surface, and *without being subject or liable to any actions for damage on account of working and getting the mines, for or by reason that the surface of the lands might be rendered uneven and less convenient to the occupiers thereof, by sinking in hollows or being otherwise defaced or injured where such mines should be worked.* Thus the instrument provided in terms, as to which there could be no question or doubt, that the surface might be let down. So, again, in *Buchanan* v. *Andrew* (2) a piece of land was granted with a reservation of the whole of the subjacent minerals to the superior, and with a stipulation that the superior should have full power to work the minerals and also to remove as much stone and other matter as might be necessary for the proper working of the minerals, and that free of all or any damage that might be occasioned to the feuar, and that he should not be liable for any damage that might happen to the buildings thereon by or through the working of the minerals. The Lord Chancellor, in moving the judgment of the House, first directed attention to the words reserving the minerals to the superior with full power to get them and to remove all such matters as might be necessary for the proper working of

(1) 8 H. L. C. 348. (2) Law Rep. 2 H. L., Sc. 286.

the minerals; and, dealing with such reservation *alone*, apart from the words freeing the superior from claims for damage in respect of the workings, he expressed himself as follows: "The effect of such a reservation standing alone, according to the law of both England and Scotland, would have been that the whole property in the mineral strata would have been reserved to, and would have remained in the previous owner, and he would have had an unlimited power of dealing with that as his own; but he would have been subject to the general restriction which every owner of property is under, expressed by the maxim 'Sic utere tuo ut alienum non lædas.'" He then proceeded to consider the effect of the additional words, freeing the superior from all claims for damage, and added, "Can anything possibly be more clear than that the intention of the parties on both sides was, that the superior was to have the unrestrained right of taking out the whole and every part of the removed minerals, the whole risk of any subsequent damage being undertaken and to be sustained by the feuar?"

The distinction, thus drawn by the Lord Chancellor, between the effect of the general power to get all the minerals and to remove all such matters as might be necessary for the proper working them, and of language freeing the party entitled to get the minerals from all claims for damage in respect of getting them, is one most important to be borne in mind in dealing with cases of a similar character. I pass on to apply the principles to which I have referred to the construction of the Act of Parliament, by the provisions of which the present case must be determined. After various recitals, to which I deem it unnecessary to refer, and after various provisions for dividing and allotting amongst the owners of ancient dwelling-houses within the manor the residue of the moor which should remain after making certain specific allotments thereby directed, and for the execution of an award in respect thereof, it is enacted as follows: "That immediately after finishing the said division and allotments and the execution of the said award or instrument, all right of common upon the said moor or common shall cease and be extinguished, and the lots and parcels of land so to be allotted as aforesaid shall be held and enjoyed by the persons to whom the same shall be so allotted

1883

BELL v. LOVE.

Baggallay, L.J.

respectively in the same manner and by the same tenure, estates, and terms of years as the respective dwelling-houses in right of and for which the said lots or parcels of land shall be so allotted are now holden."

Now the effect of these words, apart from the provisos which follow, and to which I will direct attention presently, is to extinguish all rights of common over the moor, including, of course, any rights of common which could be claimed by the dean and chapter or other the owners for the time being of the soil and inheritance of the moor, and to vest in the commoners, in lieu of their extinguished rights of common, freehold or leasehold estates, as the case might be, in the designated and inclosed portions of the moor allotted to them. The house of the plaintiffs, which has been cracked and damaged by the letting down of the surface occasioned by the defendants' workings, stands upon a portion of the lands allotted to Thomas Phillipson in respect of his ancient *freehold* dwelling-house; the lands so allotted to him accordingly became vested in him as freehold, and primâ facie being freehold, with the right not only to the freehold surface but to all the minerals beneath. If, therefore, it was the intention of the parties to reserve to the dean and chapter, as lords, any rights in respect of the minerals underlying the several allotments of the surface of the moor, it was essential, according to the general principles enunciated in the case of *Rowbotham* v. *Wilson* (1), that the nature and extent of such reservation should be indicated by the Act of Parliament, and to indicate the same the provisos were inserted. Before, however, proceeding to examine the terms of these provisos, I may observe that, if there were any doubt as to the words above quoted carrying, per se, not only the surface of the freehold allotment, but the minerals underlying such surface, the utmost that could be drawn from them in favour of the defendants would be, that the allotted lands, though they became vested in the commoners in fee simple, were nevertheless subject, as to the minerals thereunder, to a right of the dean and chapter of the same nature and extent as their right before the passing of the Act, in respect of the minerals underlying the ancient freehold dwelling-houses, that is, to an absolute right to the minerals under

(1) 8 H. L. C. 348.

lying the allotments, but with a right to get them, limited to such getting as should occasion no injury to the owners of the allotments. Such a construction, however, of the Act of Parliament would in no respect assist the defendants on the present appeal.

I pass on to examine the provisos, upon the first of which the defendants mainly rely; it is in the following terms: "Nothing in this Act contained shall prejudice, lessen, or defeat the right, title, and interest of the said dean and chapter and their successors of, in, or to the royalties incident or belonging to the said manor, barony, and borough of Elvet, but that the said dean and chapter and their successors, and all and every person or persons claiming under or in trust for them as owners of the royalties of the said manor, barony, or borough, and all succeeding owners thereof for the time being, shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting way-leave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony, or borough incident, appendant, and belonging or appertaining (other then and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be inclosed as aforesaid), in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made."

The language of this proviso is very comprehensive, and at first sight would appear to support the contention of the defendants; but this view of its effect will not stand the test of a critical examination of its terms. And, first, as regards its general scope and effect. Not only had all rights of common over the moor been extinguished by the preceding clause, but it was at least doubtful whether the rights of the dean and chapter as lords of the manor, in respect of the minerals underlying the moor, had not been interfered with. Had, therefore, the proviso been intended to secure to the lords all those rights in respect of the minerals underlying the moor to which they had previously been entitled, we should have expected to find some specific allusion to such minerals, and a reservation of the rights of the dean and

1883

BELL v. LOVE.

Baggallay, L.J.

chapter in respect of them. But such is not the case; on the contrary, we find that the reservation in respect of royalties and mines is extended to the whole of the manor, without any special reference in this respect, to the moor as part thereof, and without any suggestion, except such, if any, as may be inferred from the words which I shall next deal with, that the dean and chapter had reserved to themselves any rights in respect of the getting of minerals underlying the manor, other than the primâ facie rights of an owner of minerals as against the owner of the surface. But the defendants rely upon the declaration in the proviso *that the enjoyment of the reserved royalties is to be in as full, ample, and beneficial manner as if the Act had not been passed.* Now, if the Act had not been passed, the dean and chapter would have been entitled to get the minerals as they might think fit, subject only to the restriction that they must leave sufficient pasturage for the commoners, and the contention of the defendants is, that, the rights of common having been extinguished by the Act, they, as lessees of the dean and chapter, are entitled to get the minerals as they may think fit, *without any restriction whatever;* in other words, that the dean and chapter having granted the freehold of the surface, they or their *lessees* are entitled, if they deem it necessary or expedient, to destroy the freehold thus granted. That a grant may be so worded, as to confer such a power of depriving it of all value, is clear from the authorities which have been cited; but, as has been before observed, the language in which the power is reserved must be clear and beyond all doubt. Can it be so said of the terms of the proviso which we are considering? I think not, it would be a much more reasonable construction of the language used to hold that, whereas before the Act the lords were entitled to work the minerals subject to the then rights of the commoners, they were entitled under the Act to work them subject to the substituted rights of the commoners, that is, to their rights as owners of a freehold surface to have that surface supported. Upon the whole, I have come to the conclusion that the rights reserved by this proviso to the dean and chapter, or other the owners for the time being of the royalties of the manor, are the fullest and most ample rights of getting the minerals underlying the several allotments of portions of the

moor which are consistent with the tenure by which such allotments are held; but that such rights do not extend to authorize them, in getting such minerals, to disturb or let down the surface of freehold allotments. This appears to have been the view adopted by Manisty, J., in disposing of the case in the Queen's Bench Division.

Having formed this opinion as to the proper construction of the proviso which I have just examined, I have but few observations to make as to the further proviso which follows it. It provides that, in case the dean and chapter or any person claiming under them shall work any mines lying under any of the allotments, or shall lay or use any ways through or over any of the allotments, satisfaction for the damage or spoil of ground occasioned thereby is to be made by the persons working such mines or laying or using such ways, to the persons in possession of such ground at the time of such damage or spoil; it further provides as to the manner in which the amount of such satisfaction is to be ascertained, but with the limitation that it is not to exceed 5*l.* per annum, during the time of working the mines or continuing or using the ways, for every acre of ground damaged or spoiled. This provides for compensation to the occupier of the surface only, in respect of damage occasioned to him by working the mines underlying his surface, or by the use of ways over his surface, in connection with workings under his surface or under other allotments; it evidently points to temporary and not to permanent damage; if the mines are no longer worked and the ways are no longer used, compensation cannot be recovered, under the terms of this proviso, even though the injury to the surface may remain; the proviso cannot therefore cover the case of a letting down of the surface, which would be a permanent damage; nor does it in any way provide for damage or injury occasioned to the owner of the freehold; it was this that led us to suggest that the owner of the freehold should be made a party to the action and to the special case; and that the facts as to the respective interests of the freeholder and of the occupying tenant should be found; and this has accordingly been done. The view, however, which I have taken of the effect of the provisions of the Act of Parliament, which precede the proviso now

1883

BELL v. LOVE.

Baggallay, L.J.

under consideration, is unaffected by the provisions of the latter. They define the nature and extent of the compensation to be made to the occupier of the surface for the temporary use of the surface so occupied by him; but they do no more; they leave both the freeholder and the occupier claiming through him to assert all other rights acquired by the former, or which he can claim by reason of his freehold title, and which include a right to compensation for any permanent injury to the surface.

Under these circumstances I am of opinion that the appeal should be dismissed. I have the authority of Lord Coleridge, C.J., who heard the argument, to say that he agrees in the conclusion at which I have arrived; he agrees also with the substance of my judgment, and he thinks it unnecessary to write a judgment of his own. At the conclusion of the arguments Lord Coleridge, C.J., was prepared to give judgment for the plaintiffs: I, however, then had some doubt; but for the reasons, which I have stated at length, I now concur in his view.

LINDLEY, L.J. In this case the main point discussed was the true construction of the Inclosure Act set out in the special case, and reference was made to several authorities bearing on the construction of Inclosure Acts more or less similar to that which we have to interpret. These authorities may be conveniently divided into two groups, viz., first, *Rowbotham* v. *Wilson* (1), *Smith* v. *Darby* (2), *Duke of Buccleuch* v. *Wakefield* (3), *Aspden* v. *Seddon* (4), and *Gill* v. *Dickinson* (5), in all of which the mineral owner was held entitled to let down the surface; and, secondly, *Smith* v. *Haines* (6), *Blackett* v. *Bradley* (7), and *Hext* v. *Gill* (8), in which he was held not so entitled. These cases appear to me to establish two propositions, viz., first, that an Inclosure Act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the Act is clearly and unmistakably to that effect;

(1) 8 H. L. C. 348.
(2) Law Rep. 7 Q. B. 716.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 10 Ch. 394; 1 Ex. D. 496.
(5) 5 Q. B. D. 159.
(6) 6 E. & B. 643; affirmed 7 E. & B. 625.
(7) 1 B. & S. 940.
(8) Law Rep. 7 Ch. 699.

and, secondly, that the absence of all provision for compensation for injury sustained by letting down the surface tends strongly to indicate that the legislature did not intend by general words to reserve to or confer upon the lord of the manor the right to work his mines so as to let the surface down. Now in this case there are several important matters to be borne in mind.

1. The lords of the manor had not in fact worked under the common in question before the Inclosure Act was passed.

2. Although the lords of the manor had worked mines in the manor without leaving any support for the surface it is not stated that the surface was in fact let down by such working.

3. The words in the Inclosure Act reserving the mines to the lords of the manor are mere general words. There is no clause (as there often is) specially dealing with mines and the mode of working them.

4. The compensation clause is clearly confined to the persons in possession of the ground injured; there is no clause for compensating the owners of allotments injured unless they are also in possession of them.

5. This circumstance and the curious wording of the compensation clause lead to the conclusion that the compensation clause is limited to temporary damage done by works on the surface, and does not deal with permanent injury to the surface by letting down. The words "spoil of ground" may possibly include permanent damage by spoil banks, but it is by no means clear that they do; and this ambiguity is not enough to serve as a basis for the conclusion that permanent damage by letting down was contemplated.

The words which created the difficulty are those which reserve to the lords of the manor "all rents, courts, perquisites, profits, mines, power of using or granting way-leave, waifs, estrays, and all other royalties and jurisdictions, ... in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." Now the only words here used applicable to mines and their working are "mines" and "using and granting way-leaves." Passing over the "way-leaves," and confining myself to "mines," I find nothing reserved except the right to hold and

1883

BELL v. LOVE.

Lindley, L.J.

enjoy them in as full and ample a manner as if the Act had not passed. But the right to hold and enjoy them is merely incidental to their ownership. The mines are reserved, but no right to work them otherwise than as ordinary owners is either reserved or conferred by the words now under consideration. The words "in as full and ample a manner," &c., occurred in *Duke of Buccleuch* v. *Wakefield* (1), and it was there pointed out that these words cannot be construed literally. Before the Act the right to work the mines was subject to the rights of the commoners. After the Act there are no commonable rights to restrict the right to work the mines. It is impossible, therefore, to hold that the Act has made literally no difference in the right to work them. But if this is impossible, it follows that notwithstanding the words of the Act the right to work the mines must be somewhat more or somewhat less extensive after the Act than before, and the authorities seem to me to shew that an interpretation which restricts them rather than an interpretation which enlarges them is the proper interpretation in the absence of some context leading to an opposite conclusion. Construing the statute by the light of former decisions, I am of opinion that the short legal effect of the Act is to convert the commoners into owners of the surface, subject to such rights of interference as are clearly reserved to or conferred by the Act upon the lords of the manor. On the other hand, the Act reserves to the lords the mines and the right to hold and enjoy them as owners, but with no additional rights except such as are clearly reserved or conferred by the Act itself, and I cannot find any right to let down the surface reserved or conferred in sufficiently clear language to justify the lords in so working their mines as to let the surface down.

There is another point in the case which ought not to be passed over, I mean the fact that the house let down has been erected more than twenty years. It was originally built before 1826; it was altered and enlarged in 1854 and again in 1877, but paragraph 13 of the case shews that the land on which the house stood would have been let down whether any house had been on it or not. In other words, the alterations and additions made

(1) Law Rep. 4 H. L. 377.

1883

BELL v. LOVE.

Lindley, L.J.

within twenty years before the commencement of the action did not cause the house to subside. The mines under the house were worked out in 1877, and such working occasioned the injury complained of. It appears to me that under these circumstances the plaintiffs are entitled to damages for the injuries done to the house even if the Inclosure Act ought to be construed as contended by the defendants. *Dalton* v. *Angus* (1) shews that as the house had existed more than twenty years before it was undermined the defendants had no right to let it down. An Inclosure Act might no doubt be so worded as to confer a right to let down a house even after it had stood for twenty years; but whatever doubt there may be as to the true construction of the Act before us in other respects, I can find no such right as this conferred by it. I agree with the other members of the Court that the appeal ought to be dismissed with costs. I may add that at the conclusion of the arguments I felt some doubt, but I have come to a conclusion in favour of the plaintiffs from studying the authorities which I have mentioned.

Judgment affirmed.

Solicitors for plaintiffs: *Munns & Longden, for E. Gleadowe Marshall, Durham.*

Solicitors for defendants: *White, Borrett, & Co.*

(1) 6 App. Cas. 740.

J. E. H.

1882
June 29.

[IN THE COURT OF APPEAL.]

FLOWER AND OTHERS *v.* SADLER.

Bill of Exchange—Illegality of Consideration—Compounding Felony—Liability of Acceptor—Indorsee.

In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to shew that the creditor was thereby induced to abstain from prosecuting.

Ward v. *Lloyd* (7 Scott N. R. 499) followed.

Williams v. *Bayley* (Law Rep. 1 H. L. 200) explained.

Semble, per Brett and Cotton, L.JJ., in an action by an indorsee of a bill of exchange against an acceptor for valuable consideration, it is no defence that the bill was indorsed by the drawer to the plaintiff in order to stifle a prosecution for felony.

APPEAL by the defendant from the judgment of Denman, J., in favour of the plaintiffs.

The facts are fully stated in the judgment of Denman, J. (1), and it is here necessary only to give the following short statement of them:—

Maynard had been employed to collect rents on behalf of the plaintiffs; he failed to account for a large sum, and the plaintiffs threatened to prosecute him for embezzlement. Maynard afterwards indorsed to the plaintiffs certain bills of exchange drawn by him upon, and accepted by, the defendant; the consideration for the defendant's acceptance was the sale to him by Maynard of a share in a patent. The indorsement of the bills of exchange by Maynard to the plaintiffs was not done under the influence of the plaintiffs' threat, and was a free and bonâ fide transaction.

Fullarton, for the defendant. The plaintiffs had threatened to prosecute Maynard for embezzlement. This threat was sufficient to vitiate any security subsequently given by Maynard for the debt due from him; in fact the indorsement of the bills to the plaintiffs was an act done to stifle a prosecution for felony, and therefore the plaintiffs cannot sue upon them: *Keir* v. *Leeman* (2);

(1) 9 Q. B. D. 83. (2) 9 Q. B. 371.

Williams v. *Bayley*. (1) In giving judgment, Denman, J., relied upon *Ward* v. *Lloyd* (2); but that case is distinguishable in its facts, and, moreover, is not binding since *Williams* v. *Bayley*. (1) Further, the learned judge drew a wrong inference as to the facts; the bills of exchange were delivered by the defendant to Maynard to be discounted; they were not accepted by the defendant in payment of a share in a patent sold to him by Maynard.

Finlay, Q.C., was not called upon to argue for the plaintiffs.

LORD COLERIDGE, C.J. I think that the judgment of Denman, J., is right, and ought to be affirmed. The action is brought upon three bills of exchange. The defendant has alleged that he handed them to Maynard in order to be discounted, but Denman, J., has found that the bills of exchange were accepted upon a good consideration, that is, for the purchase of a share in a patent. Maynard had been employed in a situation of trust, and had been guilty of a breach of duty; the plaintiffs had threatened him with a prosecution, and had used strong expressions with reference to his conduct. The bills were then delivered over to the plaintiffs. The question is, whether a defence arises upon these facts. It is said that the consideration for the transfer of the bills of exchange to the plaintiffs was the compromise of criminal proceedings, and that they were not the lawful indorsees of them. Upon the facts of the case there is no foundation for this argument; there was no agreement to stifle a prosecution for felony. The evidence fails to disclose even a vestige of an agreement of that kind; the form and the subject of the transaction was different. The plaintiffs used threats to Maynard, but they did not come to an agreement with him not to prosecute him. A creditor may use strong expressions and even threats; and it was held in *Ward* v. *Lloyd* (2) that strong language is not conclusive evidence of an agreement to compound a felony or to stifle a prosecution. Both the facts and the law fail to support the case for the defendant. In *Keir* v. *Leeman* (3) it was held by the Court of Exchequer Chamber

(1) Law Rep. 1 H. L. 200. (2) 7 Scott, N. R. 499.
(3) 9 Q. B. 371.

1882

FLOWER v. SADLER.

upon error from the Court of Queen's Bench, that the compromise of a prosecution for an assault, coupled with riot and the obstruction of a public officer, was illegal; but Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber, said (1): "We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." I think that upon the authorities there can be no question that the plaintiffs had a right to take security for the debt due from Maynard; it is open to any creditor to obtain payment of a debt justly due to him. We have been referred to *Williams* v. *Bayley* (2); as that was a decision of the House of Lords, we should of course submit to it; but the principle of law there laid down is not applicable to the present case, for the plaintiff in the suit in the Court of Chancery sought to enforce the delivery of certain securities obtained from him without consideration. It is plain that there was no consideration for the plaintiff in that suit rendering himself liable for the debts of his son. The state of facts was different. I do not understand that any alteration of the law was caused by the decision in that case. I do not understand that the opinions of the Law Lords interfered with the general principles as to the right of a creditor to secure payment of his debt. A creditor has a perfect right to recover his debt by action; and upon this ground I think that the judgment of Denman, J., must be affirmed. The view taken by the learned judge, both as to the law and as to the facts, was correct.

BRETT, L.J. In this case the defendant is the acceptor of three bills of exchange, which have been indorsed by the drawer to the plaintiffs. The defendant, however, contends that he is not liable, and he alleges that he handed the bills to Maynard for a particular purpose, namely, to get them discounted, which purpose Maynard failed to effect. But Denman, J., has found that this allegation is not correct, and that the bills were given in payment of a share in a patent. I see no reason to differ from Denman, J. It has been contended that the defendant is not

(1) 9 Q. B. 395. (2) Law Rep. 1 H. L. 200.

liable on the bills, because the transaction between the plaintiffs and Maynard was unlawful. I doubt whether in an action against an acceptor for valuable consideration it can be said that the indorsement by the drawer was unlawfully made; but I do not give judgment upon this ground. It has been contended that the consideration for indorsing the bills was the compromise of a prosecution for felony. Denman, J., has found that there was no agreement to stifle a prosecution, and I think that there was no agreement of that kind in point of fact. I think, moreover, that there was no definite threat of a prosecution, and Denman, J., seems to have been of the same opinion. If the view taken by Denman, J., in his judgment as to the facts is right, the whole fabric of the defendant's case fails. Denman, J., appears to have been further of opinion that even although there had been a threat to prosecute Maynard which induced him to indorse the bills, the present action would be maintainable, because a debt was actually due from Maynard, and there is nothing illegal in a creditor endeavouring to obtain payment of his debt. Denman, J., referred to *Ward* v. *Lloyd*. (1) I think that we ought to treat that case as binding on us. It has been contended that the decision in that case has been in effect overruled by the opinions delivered in the House of Lords in *Williams* v. *Bayley*. (2) The proposition of law laid down in *Ward* v. *Lloyd* (1) is that if a debt really exists, the right to sue for it must be upheld even although there may have been a threat by the creditor of criminal proceedings; in *Williams* v. *Bayley* (2) the only consideration for the respondent rendering himself liable for his son's debt was the giving up of certain forged documents in respect of which the son might have been prosecuted. In the present case the indorsement of the bills to the plaintiffs was not invalid; I think that the judgment of Denman, J., was quite right, and that the defence wholly fails.

COTTON, L.J. The defence in this case is that the bills were indorsed upon an illegal consideration; in my opinion that is the whole foundation of the defendant's case. I am of opinion that, in strict law, the defendant cannot raise this point, for he is

(1) 7 Scott, N. R. 499. (2) Law Rep. 1 H. L. 200.

1882

FLOWER v. SADLER.

an acceptor, and in order to escape from liability he must shew that the bills of exchange were indorsed to the plaintiffs in fraud of himself. However, I do not give judgment upon this ground. It has been contended that the plaintiffs obtained the indorsement of the bills by virtue of a threat to prosecute Maynard. It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal; and the doctrine contended for does not apply, where a just and bonâ fide debt actually exists, where there is a good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt, which he justly owes to his creditor. I cannot satisfy myself that Denman, J., was wrong in the inference which he drew from the facts; he arrived at the conclusion that the bills were not indorsed under the influence of the plaintiffs' threat, and that the transaction between Maynard and the plaintiffs was done in the ordinary course of business. I think that the principle of *Williams* v. *Bayley* (1) is sufficiently explained by the opinions delivered in the House of Lords; it is pointed out by Lord Westbury that the father had no consideration for agreeing to relieve his son from liability. The present case does not come within the principle of *Keir* v. *Leeman*. (2)

Judgment affirmed.

Solicitors for plaintiffs: *W. & J. Flower & Nussey.*
Solicitor for defendant: *C. Harcourt.*

(1) Law Rep. 1 H. L. 200.

(2) 9 Q. B. 371.

J. E. H.

[IN THE COURT OF APPEAL.]

1882
Dec. 15.

ANCKETILL, APPELLANT; BAYLIS, RESPONDENT.

Parliament—Borough Vote—Dwelling-house—Part of a House—Vacant Room—Occupation as Householder or Lodger—30 & 31 *Vict. c.* 102, *ss.* 3, 61—41 & 42 *Vict. c.* 26, *s.* 5.

The claimant of a borough vote had during the qualifying period occupied as sole tenant at a weekly rent a room in a house, which he furnished himself, as his residence. At the commencement of the qualifying period all the rooms in the house were similarly let off to tenants as their residences, each tenant having a key to his room and a key of the front door. During the qualifying period the tenant of one of the other rooms relinquished his tenancy, and gave up the key of his room and his front door key to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacant room. The landlord did not during any part of the qualifying period reside in the house or any part of it, either personally or by any servant, nor did he exercise any control over it, except such control, if any, as might by law be conferred on him by reason of the vacating of the room and the delivery of the keys to him by the outgoing tenant as aforesaid :—

Held, affirming the judgment of the Queen's Bench Division, that the claimant was entitled to the franchise as an inhabitant occupier of a dwelling-house.

APPEAL from the decision of the revising barrister for the borough of Chelsea.

The facts were as follows :—The appellant had duly objected to the name of one Roberts (hereinafter referred to as the voter) being retained on the list for a parish in the said borough of those entitled to vote otherwise than as lodgers for the said borough.

The said voter had occupied for upwards of twelve calendar months previously to the 15th of July, 1882, as his residence a room in a dwelling-house situate within the said parish as sole tenant at a weekly rent. He had a right of ingress and egress by the stairs of the house, passage, and front door. The room was let unfurnished and was furnished by the said voter.

The room was rented by the said voter from the tenant of the entire house (hereinafter called the landlord) who held of the owner of the house at a yearly rent. The said voter had a key to his room-door, and also a key (one of several) to the front door of the house.

1882

ANCKETILL v. BAYLIS.

The entire house was rated to the poor-rates during the qualifying period, but the room occupied by the said voter was not separately rated; all rates had been duly paid.

At the commencement of the said qualifying period all the rooms in the house were let to tenants as their residences with the like rights as to ingress and egress as the said voter had. During the said qualifying period a tenant of another room in the said house relinquished the tenancy of such room, and gave up the key of the room and also his own key of the front door to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacated room. (1)

During no portion of the said qualifying period did the landlord actually reside in the house or any part of it either himself or by any servant, or attempt to exercise, or in fact have any control over it, except such control, if any, as may have been by law conferred on him by reason of the vacation of the room by the outgoing tenant as before mentioned, and delivering up to him as the landlord of the key of the outgoing tenant's room and of the outgoing tenant's front door key. No services were rendered by the landlord to the said voter.

It was contended on behalf of the objector that, on vacation of his room by the tenant of another room as aforesaid during the said qualifying period and the delivery up by such outgoing tenant of the key of his room and the key of the front door to the landlord as before mentioned, the landlord thereupon was ipso facto by law restored to such control over the house as to change the status of the said voter from that of inhabitant occupier to the status of lodger in his room, and that the said voter having been during part of the qualifying period an inhabitant occupier of and during other part lodger in his room was not entitled to be retained on the occupiers' list.

The revising barrister overruled the objection, being of opinion that the said voter had continued to be an inhabitant occupier during the whole of the said period of qualification, and retained his name on the list.

The appeal was a consolidated appeal, the cases of various

(1) It was not stated by the case what those steps were.

other voters specified in the schedule thereto being precisely similar to that of Roberts.

Dec. 5. *Webster, Q.C.* (*Crump*, with him), for the appellant. It is submitted that in this case the claimant of the vote had not occupied as a householder during the whole of the qualifying period. Inasmuch as one of the rooms in the house was vacant for part of such period and the landlord had the keys, the landlord must be deemed in law to have been in the occupation of such room during such vacancy, and consequently, in accordance with the principles laid down by the Court of Appeal in the case of *Bradley* v. *Baylis* (1), the occupation of the occupiers of the other rooms must be taken to have been during such vacancy subordinate to the landlord's general possession of the house, and such occupiers were lodgers not householders. Brett, L.J., in giving judgment, put this very case. He says: "But supposing during the qualifying year one of these lodgers leaves and the owner thereupon (as assuredly he must) resumes the control over the unlet part, according to my view of those statutes, immediately by that act of his those people left in the house who have been householders become lodgers again." The judgments of the other judges, though they do not so precisely apply to the present case, involve the same principle.

[LORD COLERIDGE, C.J. Is it not the essential feature in the cases decided by the Court of Appeal that there was actual residence in the house by the landlord, or by some servant representing him?

FIELD, J. The facts of this case come very near that of the case of *Kirby* v. *Biffen* (1) in which the Court of Appeal held the occupiers to be householders not lodgers.]

There was not in that case any room vacant during the qualifying period.

[FIELD, J. But is not the general effect of the language used by the judges in the Court of Appeal to limit the application of the decision to cases where the landlord actually resumes control or residence?]

(1) 8 Q. B. D. 195.

1882

ANCKETILL v. BAYLIS.

[He also cited *Ness* v. *Stephenson* (1), and *Morton* v. *Palmer*. (2)]

G. M. Freeman, for the respondent. It is submitted that, with the exception, perhaps, of what was said by Brett, L.J., there was nothing said by the judges in the Court of Appeal in *Bradley* v. *Baylis* (3) which concludes the present case. It is difficult to see, assuming that the position of the occupier of a room in a house is as between himself and his landlord that of a householder, how something done behind his back between the landlord and the occupier of another room can affect his position. It is submitted, however, that, giving the fullest effect to the decision of the Court of Appeal, the test to be applied in accordance with the decision is, whether there was any control exercised by the landlord. It may be a necessary inference if the landlord or his servant resides in the house that the general control of the house is in the landlord, but here the revising barrister expressly finds that the landlord in fact never resided in the house or exercised any control over any part of it. The landlord here had a bare right with regard to the vacant room which he never in fact exercised except by taking the usual steps to relet it.

[He cited *Score* v. *Huggett* (4); *Toms* v. *Luckett*. (5)]

LORD COLERIDGE, C.J. This case turns on certain provisions of the Representation of the People Act, 1867, and the Parliamentary and Municipal Registration Act, 1878, provisions upon which it does not seem to me so difficult to put a reasonable construction as has been suggested. We are bound by the decision of the Court of Appeal in *Bradley* v. *Baylis* (3) as to the effect of those provisions, and I desire to give the fullest effect to that decision; but I must say that it does not appear to me that the facts of the present case bring it within the authority of that case. I found my decision in the present case upon the findings of the revising barrister with regard to the facts in the paragraphs in which he states that "during the said qualifying period a tenant of another room in the house relinquished the tenancy of such room and gave up the key of the room and also his own key of the

(1) 9 Q. B. D. 245.
(2) 51 L. J. (Q.B.D.) 7.
(3) 8 Q. B. D. 195.
(4) 7 M. & G. 95; 14 L. J. (C.P.) 74.
(5) 5 C. B. 23; 17 L. J. (C.P.) 27.

front door to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacated room; and that during no portion of the said qualifying period did the landlord actually reside in the house or any part of it, either himself or by any servant, or attempt to exercise or, in fact, have any control over it, except such control, if any, as may have been by law conferred on him by reason of the vacation of the room by the outgoing tenant as before mentioned, and delivering up to him as the landlord of the key of the outgoing tenant's room and of the outgoing tenant's front door key." Those are the facts found by the revising barrister, and on those I rest my judgment. It does not appear to me that they prevent the occupiers of the rest of the house from being inhabitant occupiers of dwelling-houses within the meaning of the Representation of the People Act and the Act of 1878. Upon these facts it seems to me that the decision of the revising barrister was correct. I am aware that in so deciding I am deciding apparently contrary to the principle of some portion at least of the judgment of my learned Brother Brett, L.J., who is reported in the Law Reports in *Bradley* v. *Baylis* (1) to have said: "but supposing during the qualifying year one of those lodgers leaves and the owner thereupon (as assuredly he must) resumes the control over the unlet part, according to my view of the statutes immediately by that act of his those people left in the house who have been householders become lodgers again." If that dictum is law, this case may perhaps come within it, for undoubtedly in this case part of the house became vacant for a portion of the qualifying year, and though the landlord did not in fact reside or exercise any control, yet it is possible in one view of the judgment of the learned Lord Justice that he might think this immaterial, and that the mere fact of one room becoming vacant by force of law disqualified the tenants of the others as occupiers. Assuming that such was the learned Lord Justice's view, it does not seem to me that the opinion he so expresses was necessary for the decision of the case referred to, or that it forms any part of the actual ratio decidendi. If this case goes to appeal it will be for the Court of

(1) 8 Q. B. D. 195.

1882

ANCKETILL v. BAYLIS.

Appeal to determine whether the opinion so expressed is the law, but it does not appear to be binding upon us as an authority.

For these reasons I think the decision of the revising barrister should be affirmed.

FIELD, J. I am of the same opinion. I must say I too cannot see such great difficulty in construing the provisions of the enactments upon which this case turns, and it seems to me that if the case had been destitute of any previous authority I should have arrived at the same conclusion, viz., that in this particular case the voter is entitled to the franchise as an occupier. The only question is this, viz., whether there was during the qualifying year a period of time during which a person who had previously been admittedly an occupier was prevented from being so, and became a lodger by something with which he had nothing to do taking place between two other persons, viz., his landlord and someone else who had ceased to occupy a room in the house. It is difficult to see how his right can be affected in that way. In this particular case the statement of the facts satisfies me that the case does not come within the principles laid down by the decisions in *Bradley* v. *Baylis* (1) and *Morfee* v. *Novis* (1) in the Court of Appeal. The present case comes nearer to that of *Kirby* v. *Biffin* (1), though in that case there was no vacancy of any room in the house during the qualifying period. I should not have thought that that was material but for the observations of Brett, L.J., which have been referred to. I entirely agree, however, in what my Lord has said on that point.

STEPHEN, J. I am of the same opinion, except that I confess I feel more sympathy with the expressions that have been used with regard to the difficulty of construing these statutes than my Lord and my Brother Field appear to do. I put my judgment on the facts that have been referred to as taking this case out of the decision of the Court of Appeal in *Bradley* v. *Baylis*. (1) The contention for the appellant is that the effect of the sections is, that, if during the qualifying period any one of the persons who occupy

(1) 8 Q. B. D. 195.

the different rooms of a house, admittedly as householders, goes out and leaves his room vacant, thereupon all the remaining occupiers immediately become lodgers and lose their qualification for that year. I agree with what has been said by the rest of the Court with regard to that contention. The decision will therefore be affirmed.

Decision affirmed.

E. L.

Ancketill appealed.

Dec. 15. *Crump* for Ancketill. It is submitted that the doctrine laid down by Brett, L.J., in *Bradley* v. *Baylis* (1) is correct; when the rooms became vacant, the landlord in point of of law resumed possession, and the other occupying tenants became lodgers. The two qualifications of occupying tenant and lodger cannot overlap each other; a man cannot at one and the same time assert his right to the franchise under either or both of these qualifications: see per Baggallay, L.J., in *Bradley* v. *Baylis* (2); the nature of the qualification must remain unchanged during the whole of the qualifying year.

[BAGGALLAY, L.J. I did not intend by that passage in my judgment to decide as matter of law that the two qualifications could not overlap.]

The question in the present case is, can the qualification be changed without the consent of the occupier?

Bompas, Q.C. (*G. M. Freeman,* with him), for Baylis. In the present case the question is, what constitutes a man a householder? Possibly the Legislature intended that if a voter lost his qualification as a householder, he might nevertheless successfully claim as a lodger; but it cannot have been ever intended that a householder should, without his consent, be converted into a lodger. It follows from *Smith* v. *Overseers of St. Michael, Cambridge* (3) that part of a house may be rateable; and in the present case the tenants were occupying rateable hereditaments. *Reg.* v. *St. George's Union* (4) is to the same effect, although this case is not perhaps quite consistent with later decisions. The occupiers of

(1) 8 Q. B. D. 195, at pp. 235, 236.
(2) 8 Q. B. D. 195, at p. 223.
(3) 3 E. & E. 383.
(4) Law Rep. 7 Q. B. 90.

1882

ANCKETILL v. BAYLIS.

the rooms are tenants, for they have the exclusive possession; and a lodger has not a possession of that kind: *Allen* v. *Liverpool.* (1) The only authority in favour of Ancketill is the dictum of Brett, L.J., in *Bradley* v. *Baylis* (2), and it is submitted that that dictum is not to be construed in the sense contended for.

Crump, in reply.

BAGGALLAY, L.J. In this case the name of the voter was put by the revising barrister upon the list of occupiers. An appeal was taken to the Queen's Bench Division where the decision of the revising barrister was affirmed. The question has now been brought to this court; but, after having heard the arguments, I cannot take a different view from that adopted by the judges who have already considered the point in dispute.

The Act of 1867 created two kinds of franchise in boroughs, namely, the inhabitant occupier, as owner or tenant, of a dwelling-house rated to the poor, and the lodger of ten pounds yearly value. I do not think it necessary to consider in detail the Act of 1878; it is sufficient to point out that by s. 5 of that statute the term "dwelling-house" is to include part of a house separately occupied as a dwelling. Here the room was occupied by the voter as a separate dwelling, and, I will assume, might be separately rated. The question to be determined is, what is the character of the occupation; whether he was a tenant or a lodger. It is to be observed that neither the Act of 1867 nor the Lodgers' Protection Act (34 & 35 Vict. c. 79), contains any definition of the term "lodger." The effect of the enactments as to the franchise was considered in three cases, which in Michaelmas Sittings, 1881, were brought before this Court. I refer to *Bradley* v. *Baylis* (3); *Morfee* v. *Novis* (3); *Kirby* v. *Biffen.* (3) In these the distinction between the lodger and the occupying tenant was illustrated; such distinction was based upon a due appreciation of the facts in the three cases, and the result is correctly expressed in the head-note. In *Bradley* v. *Baylis* (3), and *Morfee* v. *Novis* (3), it was held that the voter was a lodger: in *Kirby* v. *Biffen* (3) it

(1) Law Rep. 9 Q. B. 180. (2) 8 Q. B. D. 195, at pp. 235, 236.
(3) 8 Q. B. D. 195.

was held that he was an inhabitant occupier. These cases represent the extremes of the franchise; the case before us is of an intermediate nature. It is admitted that Roberts, the voter, occupied a room in a house, and that under ordinary circumstances he would have been entitled to the franchise as an occupying tenant; but it is alleged that, in the course of the qualifying term, one of the occupiers discontinued his occupation, and that the room previously occupied by him became at the disposal of the landlord. It does not appear whether that room was subsequently let or not, and this seems to me to be immaterial. The facts as regards the occupiers of all the other rooms were not at all changed by the circumstance, that one of the occupiers terminated his tenancy. It appears that the occupier on quitting gave up the keys of the house and of his room to the landlord; no doubt the landlord obtained control over that portion of the house, but he did not obtain control over the rest, he merely obtained possession to this extent, that he was able to get another tenant. I should have no doubt as to the application of the principles of the franchise, if it were not for certain remarks of Brett, L.J., in *Bradley* v. *Baylis*. (1) These remarks are as follows: "Supposing a man remains in the house and lets off several rooms to different persons who are then his lodgers, and he afterwards lets off all the rest of the rooms and leaves the house and preserves no actual control over it, so that he is not to go into it, either by his servants or by himself, then those persons who were before lodgers have become by that fact householders. But supposing during the qualifying year one of those lodgers leaves, and the owner thereupon (as assuredly he must) resumes the control over that unlet part, according to my view of the statutes, immediately by that act of his those people left in the house who have been householders become lodgers again." I think that the Lord Justice did not contemplate the view which has been taken of these words. No doubt, the language used may bear the construction sought to be put upon it; but I cannot think that the present case was within his contemplation. When the Lord Justice spoke about the owner resuming control, I think that he was alluding to a case where the owner resumes full and

(1) 8 Q. B. D. 195, at pp. 235, 236.

1882

ANCKETILL v. BAYLIS.

complete control, as if, for instance, he comes to reside in the vacated rooms. In my opinion this is the inference to be deduced from the view of the Master of the Rolls as expressed in *Bradley* v. *Baylis*. (1) All the judges who took part in the decision of that case, pointed out the difficulty of an exhaustive definition; in each case the law must be applied to the particular facts. I feel bound to go further and to say that if Brett, L.J., intended that the language used by him should bear the construction contended for, I must respectfully express my dissent from his conclusion.

In my opinion the judgment of the Queen's Bench Division was right, and this appeal ought to be dismissed.

SIR JAMES HANNEN. I am of the same opinion. After the full consideration which the statutes underwent in *Bradley* v. *Baylis* (2), it is only necessary to deal with the particular facts brought before us. In the present case the inmates of the house were in the first instance clearly not lodgers, but occupying tenants: can it be said that when one tenant went out and his rooms were thereby vacated, all the other tenants became lodgers? It is difficult to define the difference between a tenant and a lodger; but probably it may be said with accuracy that where the landlord himself resides in the house the other inmates are lodgers because they submit themselves to his control; but where the landlord does not reside in the house, or where he occupies a separate set of rooms in the basement, or where the house is divided into separate and independent dwellings or into separate flats with a porter, or, as happens abroad, with a concierge living upon the premises, in each of those cases, even although a servant of the landlord may be present, the separate occupation exists which is necessary to constitute a tenancy. Whenever the relation of landlord and tenant has been created, it must continue so long as the tenant continues to dwell in the house, unless he agrees or submits to a change in the nature of his occupation. I will take a case where a house has in the first instance been let to lodgers in the strict sense of the word: suppose that the landlord finds it more convenient to sleep elsewhere, but that he keeps in

(1) 8 Q. B. D. 195, at pp. 220, 221. (2) 8 Q. B. D. 195.

hand a furnished room and retains the right to come into the house; this alteration will make no difference in the relation between the landlord and the lodger. In the present case the occupiers came in as tenants, and no change has occurred in the relation existing between them and their landlord. If the landlord of occupying tenants does come in and exercise control over the inmates, there may be a change in the nature of the relation between them: but until the parties have acquiesced in the alteration of the existing circumstances, the original condition must be presumed to remain in full force.

LINDLEY, L.J. I am of the same opinion. As I have before intimated (1), in my opinion the term "lodger" implies a personal relation existing between the "lodger" and his landlord: it is a relation which is much more easily destroyed than created. In the present case we have to see whether those who were admittedly occupying tenants have become lodgers; it seems to me that, upon the facts before us, they remained householders. I think that Brett, L.J., did not mean what he is supposed to have meant; he could hardly have intended to say that where one room in a house occupied by several tenants becomes vacant, the remaining tenants are immediately converted into lodgers, even although the landlord does not resume the actual, as distinguished from the legal control of the vacant room. If that was his meaning, I respectfully dissent from it.

For these reasons I think that this appeal must be dismissed.

Judgment affirmed.

Solicitors for Ancketill: *Lee & Pembertons.*
Solicitor for Baylis: *Robert Pearce.*

(1) See *Bradley* v. *Baylis*, 8 Q. B. D. 195, at pp. 245, 246.

J. E. H.

END OF VOL. X.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows :—

In the First Series,
22 Ch. D.

In the Second Series,
10 Q. B. D. 8 P. D.

In the Third Series,
8 App. Cas.

INDEX.

ACTION, RIGHT OF—*Statement of Claim shewing Felony—Demurrer.*] A statement of claim is not demurrable on the ground that it shews the cause of action to be a felony for which the felon has not been prosecuted. ROOPE *v.* D'AVIGDOR [412

ADMISSION ON PLEADINGS — Claim and counterclaim—Order XL. r. 11 - 457
See PRACTICE.

ADULTERATION—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 8—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6—*Gin more than* 35 *Degrees under Proof.*] By s. 6 of 42 & 43 Vict. c. 30, it is provided that "in determining whether an offence has been committed under 38 & 39 Vict. c. 63, s. 6, by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . . 35 degrees under proof for gin."—The appellant sold to the respondent gin more than 35 degrees under proof, but, at the time of sale, brought to his knowledge a printed notice hanging up in the room to the effect that all spirits were sold "as diluted spirits, no alcoholic strength guaranteed":—*Held*, that although the appellant had not a good defence under 42 & 43 Vict. c. 30, s. 6, he was not by that section deprived of any defence which he would have had under 38 & 39 Vict. c. 63, and that the sale not having been to the prejudice of the purchaser, no offence had been committed under 38 & 39 Vict. c. 63, s. 6. GAGE *v.* ELSEY - 518

ADVOWSON—Transfer during vacancy - 407
See ECCLESIASTICAL LAW. 1.

ALTERATION—Bill of exchange—Figures 30
See BILL OF EXCHANGE.

APPEAL—Criminal matter—Bail - - 378
See PRACTICE. 2.

APPORTIONMENT—Rent, assignment of term
See LANDLORD AND TENANT. [48

BANKRUPTCY—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 39—*Mutual Dealings—Set-off—Landlord and Tenant—Trustee in Bankruptcy—Non-disclaimer of Tenancy, effect of—Outgoing Tenant—Landlord's Right to Set off Rent accrued due before Bankruptcy against Trustee's Claim as outgoing Tenant for Tillages.*] A debtor, who was tenant from year to year of a farm upon the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages and cultivation according to the custom of the country, filed a petition for liquidation of his affairs under the Bankruptcy Act, 1869, and a trustee was appointed, who did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors until the tenancy was determined by notice to quit. The debtor's estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages and cultivation by the trustee during his tenancy, according to the custom:—*Held*, that the landlord was not entitled to set off rent, accrued due from the debtor before the liquidation proceedings, against the trustee's claim. ALLOWAY *v.* STEERE - - - - 22

—— Plaintiff—Refusal of trustee to proceed 114
See PRACTICE. 3.

BEER—Duty—Brewer - - - 483
See REVENUE.

BETTING—Employment of agent to bet in his own name—authority to pay bet - 100
See GAMING.

BILL OF EXCHANGE—*Acceptance in Blank—Effect of Figures in Margin—Fraudulent Alteration of Figures—Negligence.*] The defendant signed an acceptance, the amount in the body of which was then left in blank, but in the margin of which were the figures 14*l.* 0*s.* 6*d.*, that being the sum for which the defendant desired to accept. He then handed the acceptance to the drawer, who subsequently filled in the blank in the body of the bill for 164*l.* 0*s.* 6*d.* and fraudu-

BILL OF EXCHANGE—*continued.*

lently altered the figures in the margin to that sum. The bill was then indorsed by the drawer to the plaintiffs, who took it bonâ fide for value for the larger amount:—*Held*, that the defendant was liable on the bill for such larger amount, on the grounds that the marginal figures are not an essential part of a bill of exchange; that one who gives an acceptance in blank holds out the person he entrusts therewith as having authority to fill in the bill as he pleases within the limits of the stamp; and that no alteration (even if it be fraudulent and unauthorised) of the marginal figures can vitiate the bill as a bill for the full amount inserted in the body when it reaches the hands of a holder for value who is unaware that the marginal figures have been improperly altered. GARRARD *v.* LEWIS - - - - 30

2. —— *Illegality of Consideration—Compounding Felony—Liability of Acceptor—Indorsee.*] In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to shew that the creditor was thereby induced to abstain from prosecuting.—*Ward* v. *Lloyd* (7 Scott N. R. 494) followed.—*Williams* v. *Bayley* (Law Rep. 1 H. L. 200) explained.—*Semble*, per Brett and Cotton, L.JJ., in an action by an indorsee of a bill of exchange against an acceptor for valuable consideration, it is no defence that the bill was indorsed by the drawer to the plaintiff in order to stifle a prosecution for felony. FLOWER *v.* SADDLER [C. A. 572

BILL OF LADING—Exceptions—Variance between Rules of Admiralty Court and courts of common law - - - 426
See SHIP. 2.

BILL OF SALE—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *subs-s.* 2—*Affidavit filed on Registration—Description of Residence of Attesting Witness.*] The affidavit filed on registration of a bill of sale in pursuance of the Bills of Sale Act, 1878, s. 10, sub-s. 2, contained in the introductory part describing the deponent an accurate description of his residence. The body of the affidavit contained, inter alia, the following statements:—"I (the deponent) was present and saw the said (grantor of the bill of sale) duly execute the said bill of sale on the 15th day of December, 1881. The name subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of this deponent. I am a solicitor of the Supreme Court, and reside at ——;" there being thus no description of the residence of the attesting witness in the body of the affidavit:—*Held*, that the affidavit was sufficient to satisfy the requirements of the Bills of Sale Act, 1878, s. 10, sub-s. 2, in respect of the description of the residence of the attesting witness.—By Manisty, J. The body of the affidavit sufficiently incorporated by reference the description of the residence of the attesting witness contained in the introductory part.—By North, J. It is sufficient that the description of the occupation and residence of the attesting witness should be found in the introductory part of the affidavit. BLAIBERG *v.* PARKE - 90

BILL OF SALE—*continued.*

2. —— *Bill of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form given by the Act.*] The Bills of Sale Act, 1878, Amendment Act, 1882, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to the Act annexed.—The Act also provides that personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes, viz., among others: 1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security. 2. If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes. 4. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee produce to him his last receipts for rent, rates, and taxes.—By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto by way of security for the payment of 300*l.* money advanced and 180*l.* for agreed capitalised interest thereon at the rate of sixty per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates and taxes, in respect of the premises on which the goods assigned might be, when demanded in writing or otherwise; and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become bankrupt. It was also by the said bill of sale agreed that, if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act, 1878, Amendment Act, 1882:—*Held*, that the bill of sale was void as not made in accordance with the form given in the schedule. DAVIS *v.* BURTON - 414

3. —— *Rectification of Register under Bills of Sale Act*, 1878, *s.* 14—*Bill of Sale void at commencement of the Act—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 14, 23.] A bill of sale, void for want of renewal of registration at the commencement of the Bills of Sale Act, 1878, cannot be renewed under s. 14 of that Act. ASKEW *v.* LEWIS - - - - 477

BOROUGH VOTE—Description of qualification 87
See PARLIAMENT.

—— Dwelling-house—Lodger - - 577
See PARLIAMENT.

BUILDING CONTRACT—*Extras—Certificate of Surveyor conclusive.*] Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract,

BUILDING CONTRACT—*continued.*
should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—*Held*, that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive. RICHARDS *v.* MAY 400

BY-LAW—Validity - - - - - 387
See HARBOUR.

CARRIER—*Negligence—Carriers' Act* (11 *Geo.* 4 *& Wm.* 4, *c.* 68), *s.* 1—*Temporary Loss of Goods—Damages.*] A carrier is not deprived of the protection afforded by the Carriers' Act (11 Geo. 4, & 1 Wm. 4, c. 68), s. 1, merely by the fact that the loss of the goods is temporary and not permanent, nor can the owner of goods, which ought to have been but were not declared pursuant to that statute, recover damages for the consequences of the loss of them, as distinguished from the loss itself.—The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence the trunk was put on board a vessel bound for New York, where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers' Act, the value of which exceeded 10*l.* The plaintiff was obliged to replace at enhanced prices the articles within the Carriers' Act contained in the trunk:—*Held*, that the plaintiff could not recover from the defendants damages either for the temporary loss of the articles within the Carriers' Act or for being obliged to replace them at enhanced prices, a carrier being protected by the statute not only as to a loss but also as to all consequences flowing from it. MILLEN *v.* BRASCH - - C. A. 142

CASES:—*Burke* v. *South Eastern Ry. Co.* (5 C. P. D. 1) considered - - - 178
See CONTRACT.

—— *Chapman* v. *Midland Railway* (5 Q. B. D. 167) discussed - - - 71
See PRACTICE. 5.

—— *Ex parte Young* (19 Ch. D. 124) considered
See PRACTICE. [436

—— *Great Western Ry. Co.* v. *Bishop* (Law Rep. 7 Q. B. 550) distinguished - 138
See LOCAL GOVERNMENT ACTS. 2.

—— *Henderson* v. *Stevenson* (2 H. L. Sc. 470) considered - - - - 178
See CONTRACT.

—— *Hutchinson* v. *Glover* (1 Q. B. D. 138) discussed - - - - 36
See PRACTICE. 18.

—— *Murray* v. *Walter* (Cr. & Ph. 114) followed
See PRACTICE. 18. [36

—— *Reg.* v. *Dicken* (14 Cox C. C. 8) followed 74
See CRIMINAL LAW. 4.

—— —— v. *Lewis* (9 C. & P. 523) doubted 381
See CRIMINAL LAW. 3.

—— —— v. *St. George* (9 C. & P. 483) doubted
See CRIMINAL LAW. [381

CASES—*continued.*
—— *Robertson* v. *Howard* (3 C. P. D. 280) disapproved - - - - 516
See PRACTICE. 16.

—— *Saunders* v. *Crawford* (9 Q. B. D. 612) not followed - - - - 218
See ELEMENTARY EDUCATION.

—— *Walburn* v. *Ingilby* (1 My. & K. 61) discussed - - - - 36
See PRACTICE. 18.

—— *Ward* v. *Lloyd* (7 Scott, N. R. 499) followed
See BILL OF EXCHANGE. [572

—— *Williams* v. *Bayley* (Law Rep. 1 H. L. 200) explained - - - - 572
See BILL OF EXCHANGE.

—— *Zunz* v. *South Eastern Ry. Co.* (Law Rep. 4 Q. B. 539) considered - - 178
See CONTRACT.

CHURCH—Transfer of advowson during vacancy
See ECCLESIASTICAL LAW. [407

CONFLICT OF LAWS—*Incorporeal Hereditament—Lease made in England by Englishmen of Sporting Right over Land in Scotland—Absence of Seal—Action in England—Enjoyment of Right.*] By Scotch law an instrument under seal is not necessary for the conveyance of a sporting right, and therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English Courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the lex fori.—Even if such lease were invalid for want of a seal, the lessee, after having had enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease. ADAMS *v.* CLUTTERBUCK - - - 403

CONTRACT—*Repository for Sale of Horses and Carriages—Receipt delivered to Customer—Incorporation of Conditions exhibited upon Premises—Presumption of Assent.*] The defendant was keeper of a repository for the sale on commission of horses and carriages. The plaintiff delivered to him a waggonette to be sold, and took from him a printed form which contained a receipt for the waggonette, followed by the words, "Subject to the conditions as exhibited upon the premises." By one of the conditions exhibited upon the premises the defendant had power to sell any property sent to their repository which remained over one month unless all expenses were previously paid. The plaintiff did not read this receipt, but put it in his pocket without noticing it. The defendant having sold the waggonette in the exercise of the power of sale in the conditions, the plaintiff brought an action to recover its value, and at the trial the jury, having been directed that the question was whether the defendant had or had not given the plaintiff reasonable notice of the conditions, found a verdict for him:—*Held*, that the jury had been misdirected, for the condition was not unreasonable, and, having regard to the circumstances, there was nothing to take the case out of the general rule that if a document in a common form is delivered by one of two con-

CONTRACT—*continued.*
tracting parties to and accepted without objection by the other, it is binding upon him, whether he informs himself of its contents or not, and that judgment ought to be entered for the defendant without a new trial, for there was no evidence upon which the jury could have properly found for the plaintiff.—*Zunz* v. *South Eastern Ry. Co.* (Law Rep. 4 Q. B. 539); *Henderson* v. *Stevenson* (2 H. L., Sc. 470); and *Burke* v. *South Eastern Ry. Co.* (5 C. P. D. 1) considered. WATKINS *v.* RYMILL - - - - - - 178

—— Building contract—Extras—Certificate of—Surveyor - - - - - 400
See BUILDING CONTRACT.

COPYHOLD—*Arbitrary Fine—Omission to demand fixed Sum—Three Years' improved Annual Value.*] A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of three years' improved annual value of the tenement to which the admittance relates, and without stating in money the precise amount of the fine. FRASER *v.* MASON - - - - - - - 398

COSTS—Counsel at Chambers—Solicitor and client - - - - - 54
See PRACTICE. 4.

—— Injunction—Higher scale—"Injury to property" - - - - - 71
See PRACTICE. 5.

—— Judgment—Claim and counterclaim - 286
See PRACTICE. 6.

—— Order in Chambers—Discretion—Appeal
See PRACTICE. [457

—— Security for—Joint plaintiffs, one resident abroad - - - - - 13
See PRACTICE. 7.

—— Solicitor and client—Shorthand writer's note
See PRACTICE. 8. [207

COUNTY—Main roads—Expense of removing snow - - - - - - 480
See HIGHWAY.

COUNTY COURT—*Cause sent for Trial from Divisional Court—Action for Unliquidated Damages—Indorsement of Amount of Claim upon Writ—19 & 20 Vict. c. 108, s. 26.*] There is no power under 19 & 20 Vict. c. 108, s. 26, or the Judicature Act, 1875, to order an action for unliquidated damages to be tried in a county court, even where the writ is indorsed with a claim for a specified sum. KNIGHT *v.* ABBOTT - - - - 11

2. —— *Right of Defendant to sum up Evidence.*] An action remitted from the Queen's Bench Division to a county court was tried before the county court judge with a jury. After the defendant's evidence had closed his counsel claimed to address the jury, but the judge refused to allow it. The jury having given a verdict for the plaintiff the defendant applied for a rule nisi for a new trial on the ground that his counsel ought to have been allowed to sum up the evidence:—*Held*, affirming the decision of a divisional court, that as the right claimed did not exist at common law, and the 18th section of the Common Law Procedure Act, 1854, which gave such a right in the superior Courts, did not apply

COUNTY COURT—*continued.*
to county courts, there was no ground for interfering with the practice of any county court in which the defendant was not allowed to sum up the evidence. DYMOCK *v.* WATKINS - **C. A. 451**

—— Employers' Liability Act—Certiorari to remove action - - - - - 59
See MASTER AND SERVANT.

COURT—Inferior Court—Jurisdiction—Powers to give judgment under Order XL. rule 10
See MAYOR'S COURT. [504

COVENANT—To pay rent, how far divisible 48
See LANDLORD AND TENANT.

CRIMINAL LAW—*Extradition—33 & 34 Vict. c. 52, ss. 9, 10—Jurisdiction of Magistrate—Decision of Magistrate conclusive—Weight of Evidence.*] Upon an application for a habeas corpus in the case of a fugitive criminal committed by a police magistrate under the Extradition Act, the Court has no power to review the decision of the magistrate on the ground that it was against the weight of evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter. THE QUEEN *v.* MAURER - 513

2. —— *Larceny from British Ship at Foreign Port—Feloniously receiving Property stolen from British Ship at Foreign Port—Admiralty, jurisdiction of—Shipping, Criminal jurisdiction over British Ship afloat abroad—High Seas, Criminal jurisdiction on.*] Certain bonds or valuable securities were stolen from a British ocean-going merchant ship whilst she was lying afloat, in the ordinary course of her trading, in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship:—*Held* (by Lord Coleridge, C.J., Pollock, B., Lopes, Stephen, and Watkin Williams, JJ.), that the prisoners could be properly tried and convicted at the Central Criminal Court in this country, as the larceny took place within the jurisdiction of the Admiralty of England. THE QUEEN *v.* CARR [C. C. R. 76

3. —— *Attempt to Murder—Murder, Attempt—24 & 25 Vict. c. 100, ss. 14, 15.*] B. drew a loaded pistol from his pocket for the purpose of murdering S., but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand, and he was at once arrested:—*Held*, by the Court (Lord Coleridge, C.J., Pollock, B., Huddleston, B., Mainsty and Stephen, JJ.), that the offence was not within s. 15 of 24 & 25 Vict. c. 100, under which section the prisoner had been tried and convicted.—*Semble*, that the offence was within s. 14 of 24 & 25 Vict. c. 100.—*Reg.* v. *St. George* (9 C. & P. 483), and *Reg.* v. *Lewis* (9 C. & P. 523), doubted. THE QUEEN *v.* BROWN - - C. C. R. 381

4. —— *Rape on Girl between the ages of twelve and thirteen years—Statutes 24 & 25 Vict. c. 100*

CRIMINAL LAW—*continued.*
ss. 48, 51; 38 & 39 *Vict. c.* 94, *s.* 4—*Rape.*] The statute 38 & 39 Vict. c. 94, s. 4, which enacts that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour," &c., does not operate to prevent a conviction for felony, under 24 & 25 Vict. c. 100, s. 48, of a person committing a rape upon a girl between those ages.—*Reg.* v. *Dicken* (14 Cox, C. C. 8) followed. THE QUEEN *v.* RATCLIFFE **C. C. R. 74**

DAMAGES — Carrier — Negligence —Temporary loss of goods - - - **142**
See CARRIER.

DISCOVERY—Power of court to disregard affidavit of persons interrogated - **191**
See PRACTICE. 17.

—— Joint possession—Documents of title - **36**
See PRACTICE. 18.

—— Joint possession of documents - **465**
See PRACTICE. 19.

ECCLESIASTICAL LAW — *Church—Donative—Transfer of Advowson by Patron during Vacancy—Trust to appoint Nominee—Nomination of Self—Right to Benefice.*] The patron of a donative benefice, being a qualified clergyman and officiating curate of the church, by deed poll, executed during a vacancy of the benefice granted the advowson to a trustee in trust to present whomsoever the patron should nominate; the patron then by word of mouth nominated himself, and the trustee by deed poll granted the office of rector to him:—*Held*, that the transaction was valid, and that he thereupon became rector and entitled to the profits of the benefice. LOWE *v.* BISHOP OF CHESTER - - - - **407**

2. —— *District—New Parish—Marriages, right to solemnize—Marriage Fees, right to—New Parish Act*, 1843 (6 & 7 *Vict. c.* 37), *ss.* 11-15—*New Parish Act*, 1856 (19 & 20 *Vict. c.* 104), *ss.* 14, 15.] The publication of the banns of marriage and the solemnization of marriage are "ecclesiastical purposes" within the meaning of 19 & 20 Vict. c. 104, s. 14, and, where a district becomes within this section a separate and distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, and of receiving the fees for such marriages, and consequently the incumbent of the mother parish has no right to solemnize such marriages in the church of the mother parish or to receive the fees for the same. FULLER *v.* ALFORD - - - - - - **418**

ELECTION—Muncipal—Practice - - **293**
See MUNICIPAL CORPORATION.

ELECTION PETITION—Parliament—Practice
See PARLIAMENT. [**290**

ELEMENTARY EDUCATION—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *ss.* 4, 5, 8, 11—*Employment of Children*—"*Full Time Employment*"—*Attendance Order.*] By s. 5 of the Elementary Education Act, 1876, a person shall not take into his employment any child (1) who is under the age of ten years, or (2) who, being of the age of ten years or upwards, has not obtained the certificate of proficiency, or of due attendance at school, prescribed by the Act, unless such child, being of the age of ten years and upwards, is employed and attending school under the Factory Acts, or any by-law made under the Elementary Education Act, 1870.—By s. 11, if the parent of any child above the age of five years, "who is under this Act prohibited from being taken into full time employment," habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for such child, an order that the child attend one of the prescribed schools may be obtained by the local authority of the district before a Court of summary jurisdiction.—By s. 48 "a child in this Act means a child between the ages of five and fourteen years."—An attendance order was applied for, under s. 11, in respect of two children aged nine and thirteen years respectively. Neither of the children were in any employment, nor attending any school, nor had either of them obtained any certificate under s. 5:—*Held*, that the words of s. 11 "any child who is under this Act prohibited from being taken into full time employment" applied to any child prohibited from being taken into employment by s. 5, and therefore that an attendance order could be made in respect of each child.—*Saunders* v. *Crawford* (9 Q. B. D. 612) not followed. WINYARD *v.* TOOGOOD. HANCE *v.* FORTNUM - - - - - **218**

EVIDENCE—Right to sum up - - **451**
See COUNTY COURT.

EXTRADITION — Jurisdiction of magistrate — Weight of evidence - - **513**
See CRIMINAL LAW.

EXTRAS—Certificate of surveyor—How far conclusive - - - - **400**
See BUILDING CONTRACT.

FELONY, COMPOUNDING—Bill of exchange—Illegality of consideration - **572**
See BILL OF EXCHANGE.

FELONY—Prosecution before action - **412**
See ACTION, RIGHT OF.

FOREIGN JUDGMENT—*Fraud—Action in English Court.*] A foreign judgment obtained by the fraud of a party to the suit in the foreign court cannot be afterwards enforced by him in an action brought in an English court, even although the question whether the fraud had been perpetrated was investigated in the foreign court, and it was there decided that the fraud had not been committed.—To an action claiming the value of certain goods and brought upon a foreign judgment, whereby the defendants were ordered to return to the plaintiff the goods or to pay to her their value, the defence alleged that the plaintiff obtained the foreign judgment by fraudulently representing to the foreign court that the goods were not then in her possession, and by fraudulently concealing from the foreign court that the goods then were in her possession and were concealed by her:—*Held*, upon demurrer, that the defence was good. ABOULOFF *v.* OPPENHEIMER - - **C. A. 295**

FRAUDS, STATUTE OF, s. 4—*Contract—Interest in Land—Verbal Promise to devise such Interest by Will—Part Performance.*] The general principle as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds is accurately stated in the judgment in *Alderson* v. *Maddison* (7 Q. B. D. at p. 178):—*Held*, also, by Baggallay, L.J., that the illustration which is there given of such general principle that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute" is rightly qualified by the following words which are there stated, "unless it is shewn that the payment was made in respect of the particular land, and the particular interest in the land, which is the subject of the parol agreement," those qualifying words being used to cover such a case as *Nunn* v. *Fabian* (Law Rep. 1 Ch. 35).—*Semble*, per Brett, L.J., that *Nunn* v. *Fabian* (Law Rep. 1 Ch. 35) is not an authority for those qualifying words, and that mere payment of part, or even of the whole, of the purchase-money will not be sufficient under any circumstances to exclude the operation of the statute. Humphreys *v.* Green - **C. A. 148**

FREIGHT—Liability of indorsee of bill of lading *See* Ship. 4. [363

GAMING—*Betting—Employment of Agent to bet in his own Name—Implied Authority to pay Bet—When Authority is Irrevocable*—8 & 9 *Vict. c.* 109, *s.* 18.] The employment of an agent to make a bet in his own name on behalf of his principal implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable. Read *v.* Anderson - **100**

2. —— *Vagrant Act Amendment Act*, 1873 (36 & 37 *Vict. c.* 38), *s.* 3—"*Open and public Place to which the Public have or are permitted to have access*"—*Railway Carriage.*] The Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, imposes a penalty upon "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any coin, card, &c., used as an instrument or means of such wagering or gaming, at any game or pretended game of chance":—*Held*, that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the section. Langrish *v.* Archer - - - - - - **44**

GENERAL AVERAGE—Deck cargo—Jettison *See* Ship. [426

HARBOUR—*The Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 83—*Dock Company—By-laws, Validity of—Ship—Discharge of Cargo—Employment of Lumpers.*] By 10 & 11 Vict. c. 27, s. 83, the undertakers authorized by any special Act to construct a dock may from time to time make such by-laws as they shall think fit for (amongst other purposes) regulating the shipping, unshipping, and removing of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well the servants of the undertakers as others, employed in the dock. A dock company, who were the undertakers under a special Act, made by-laws that no lumpers should be allowed to work on board any vessel in the dock, but such as were authorized by the company, unless permission in writing had been previously obtained from the superintendent of the dock, and that servants of the company only should be allowed to work within the dock premises, whether on ship, lighter, or shore:—*Held*, that the by-laws were in excess of the power conferred upon the dock company by s. 83, and were therefore invalid. Dick *v.* Badart, Freres - - - - - **387**

HIGHWAY—*Main Roads—Maintenance—Expense of removing Snow—Liability of County Authority—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77, *s.* 13.] The main roads within the district of a highway authority became impassable from snow, which the highway authority removed, and they claimed one-half the expense of doing so from the county authority under the Highways and Locomotives Amendment Act, 1878, s. 13:—*Held*, that this was an "expense incurred in the maintenance" of such roads within that section, and that the county authority were liable. The Guardians of Amesbury *v.* The Justices of Wilts - **480**

2. —— *Nuisance—Cover of Water Valve—Projection of—Wearing away of Road—Local Board—Water and Highway Authority, Liability of*—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *s.* 149.] The iron cover of a valve connected with a water main was properly fixed in a highway by the defendants, but in consequence of the ordinary wearing away of the highway the valve cover projected an inch above it. The plaintiff's horse using the highway stumbled over the valve cover and was hurt. In an action against the defendants, who were both the water authority and the highway authority, for the injury to the horse:—*Held*, that it was the duty of the defendants to make such arrangements that works under their care should not become a nuisance to the highway, and that the plaintiff was entitled to recover. Kent *v.* Worthing Local Board of Health - - - - - - **118**

HUSBAND AND WIFE—*Married Woman—Conveyance of Wife's Property under* 3 & 4 *Wm.* 4, *c.* 74, *s.* 91—*Dispensing with Husband's concurrence.*] Where a husband and wife were living apart and, the wife being devisee under a will of real property on trust for sale, the husband refused to concur in a conveyance of such property upon a sale under the trusts of the will, unless he received a sum of money for doing so, the Court granted an order dispensing with the concurrence of the husband under 3 & 4 Wm. 4, c. 74, s. 91, although it was admitted by the affidavit that the husband had, since he had left his wife, to a slight extent contributed to her support. Re Caine - - - - - - - **284**

2. —— *Liability of Husband after Wife's death for her Debts before Marriage—Married Women's Property Act* (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *ss.* 1, 2.] A husband is not liable under the Married Women's Property

HUSBAND AND WIFE—*continued.*
Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), after his wife's death for her debts contracted before the marriage. BELL *v.* STOCKER [129

ILLEGITIMATE CHILD—Right to custody 454
See INFANT.

INCLOSURE—*Reservation of Minerals—Mines—Manorial Rights—Support—Damage to Surface—Compensation.*] By an Act for enclosing a moor, being the waste of a manor, the commissioners were directed to allot the residue of the moor amongst the owners of every separate ancient dwelling-house within the manor, having a right of common thereon. It was also enacted that after the allotments were made, all right of common upon the moor should cease, and the allotments should be held by the same tenure and estates as the dwelling-houses, and that the lords of the manor and all persons claiming under them should hold and enjoy all "mines, power of using or granting wayleave . . . . to the owner or owners of the said manor . . . . incident, appendant, and belonging or appertaining . . . . in as full, ample, and beneficial manner to all intents and purposes, as they could or might have held and enjoyed the same in case this Act had not been made." The Act contained a proviso, whereby it was enacted that in case the lords of the manor or any person claiming through them should work any mines lying under any of the allotments, or should lay, make, or use any way over any of the allotments, "such person or persons so working such mines, or laying, making, or using any such way or ways, shall make satisfaction for the damages and spoil of the ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled" by arbitration "and not to exceed the sum of 5*l.* yearly during the time of working such mines, or continuing or using such way or ways, for every acre of ground so damaged or spoiled."—In 1772 an allotment was made to P. under the provisions of the above-mentioned Act. No house then stood upon the allotment; but a house was built upon it before 1826, which was altered and enlarged in 1854 and again in 1877. The plaintiff S. was the owner of the house and successor in title to P.; the plaintiff B. was the occupier under a lease for twenty-one years from the 28th of November, 1876. The defendants were lessees from the lords of the manor of the coal-mines, fire-clay, and minerals under portions of the waste allotted under the Inclosure Act above-mentioned, and in 1877 began to work the coal in that portion of the mines which underlay the plaintiffs' house, and removed all the coal from under it without leaving any support for the roof of the mine. In consequence the surface of the land subsided, and the house was damaged to an amount exceeding the sum recoverable under the proviso in the Act above-mentioned. This mode of working a mine was usual and proper in the district where the mines were situate, and the mines were skilfully worked. The land on which the plaintiffs' house stood would have been let down, whether there was any

INCLOSURE—*continued.*
house on it or not:—*Held*, that the plaintiffs were entitled to have their house supported by the mines and minerals comprised in the lease to the defendants, and that the defendants were liable to pay to the plaintiffs compensation beyond that mentioned in the Inclosure Act, above referred to.—*Held*, further, by Lindley, L.J., that even if the defendants had, by virtue of the Inclosure Act, a right to let down the surface, nevertheless, the plaintiffs' house having stood for more than twenty years, they were, by virtue of the principles laid down in *Dalton* v. *Angus* (6 App. Cas. 740) entitled to a right of support for it. BELL *v.* LOVE - - - - - C. A. 547

INCOME TAX—Justices—Assize Courts - 267
See REVENUE. 2.

INDUSTRIAL SCHOOL—*Industrial Schools Act*, 1866 (29 & 30 *Vict. c.* 118), *s.* 14—*Industrial Schools Act Amendment Act*, 1880 (43 & 44 *Vict. c.* 15), *s.* 1—*Living in House resided in by Prostitutes.* A child under fourteen who lives with and under the guardianship of her mother in "a house resided in by prostitutes" may be ordered to be sent to an industrial school under 29 & 30 Vict. c. 118, s. 4, although there is no evidence of any act of prostitution on the part of the mother. HISCOCKS *v.* JERMONSON - - - 360

INFANT—*Right to Custody of Illegitimate Child.*] A woman placed her illegitimate female child soon after its birth with N. and wife, who were labouring people, intending to pay them for it. She fell into ill health and was unable to continue her payments, but N. and wife continued to maintain the child till it was nearly seven years old. The mother then applied to have the child delivered to her, which N. and wife refused. She therefore applied for a habeas corpus, which was refused by North, J., but granted by a divisional Court. N. and wife appealed. The mother, who was a kept mistress, did not propose that the child should live with her, but with a respectable married sister, whose husband was in a station superior to that of N.:—*Held*, that the appeal must be dismissed, for that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the Court. THE QUEEN *v.* NASH - - - - - C. A. 454

INSURANCE (MARINE)—*Policy, Construction of*—"*Capture and Seizure*"—*Intention to keep the Ship, whether necessary to constitute* "*Seizure.*"] In an action on a policy of insurance upon a ship, in which the subject-matter was warranted "free from capture and seizure, and the consequence of any attempt thereat," it was proved that during the continuance of the risk some natives took forcible possession of the ship in the Brass River, plundered the cargo, and damaged her so that she became a constructive total loss, and that their intention in so taking possession was only to plunder the cargo, and not to keep the ship:—*Held*, that the acts of the natives constituted a "seizure" within the meaning of the warranty, and therefore that the underwriters were not liable. JOHNSTON *v.* HOGG - - - 432

INTERROGATORIES—Matters done servant of person interrogate
See PRACTICE. 10.

LANDLORD AND TENANT—*Lease for Years—Assignment of Term—Assignment of Reversion of Part of Demised Premises—Privity of Contract—Covenant to pay Rent, whether divisible—Apportionment—32 Hen. 8, c. 34.*] The defendant, being tenant of land under a lease for years granted by the plaintiffs and containing the usual lessee's covenant to pay rent, assigned all her interest in the term. Subsequently the plaintiffs granted their reversion in part of the demised premises. No rent having been paid by the assignees of the defendant, the plaintiffs sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in the plaintiffs:—*Held*, that the covenant to pay rent was divisible; that the rent could be apportioned, although the action was founded on a privity of contract only; and therefore that the plaintiffs were entitled to recover.—*Stevenson* v. *Lambard* (2 East, 575) considered. Mayor, &c., of Swansea *v.* Thomas - - - 48

—— Bankruptcy—Trustee—Outgoing tenant—Set off—Tillages - - - 22
See Bankruptcy.

—— Incorporeal hereditament—Conflict of laws
See Conflict of Laws. [403

LARCENY—Ship—Foreign port—Jurisdiction
See Criminal Law. 2. [76

LIBEL—Publication—Interrogatories - 110
See Practice. 9.

LICENSING ACTS—*Beerdealers' Retail Licenses Act*, 1882 (45 & 46 *Vict. c.* 34), *s.* 1—"*Off*" *Licenses—Renewal—Discretion to refuse.*] The unqualified discretion which the licensing justices have under the Beerdealers' Retail Licenses Act, 1882 (45 & 46 Vict. c. 34), s. 1, to refuse a certificate for any license for sale of beer by retail to be consumed off the premises may be exercised, not only on an application for such certificate in respect of premises not theretofore similarly licensed, but also on an application for such certificate by way of renewal. The Queen *v.* Kay 213

LOCAL GOVERNMENT ACTS — *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Meat unfit for Food of Man—Exposure for sale—Purchase by Customer — Seizure — Condemnation — Liability of Seller to Penalty.*] The respondent, a butcher, exposed for sale part of a cow which had died of disease, and sold the meat to a customer, who took it home for food, and some days afterwards at the request of the appellant, an inspector of nuisances, handed it over to him, and it was condemned by a justice as unfit for the food of man:—*Held*, that the meat was not "so seized" and condemned as is prescribed by ss. 116, 117, of the Public Health Act, 1875, and therefore the respondent was not liable, as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under s. 117. Vintner *v.* Hind - - - - 63

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 91, *sub-s.* 4—*Nuisances—Accumulation or deposit a "Nuisance or injurious to Health"—Absence of Injury to Health.*] By s. 91 of the Public Health Act, 1875, "any accumulation or deposit which is a nuisance or injurious to health"

LOCAL GOVERNMENT ACTS—*continued.*

shall be deemed to be a nuisance liable to be dealt with summarily under the Act:—*Held*, that an offence within the section was committed where the accumulation emitted offensive smells which interfered with the personal comfort of persons living in the neighbourhood, but did not cause injury to health.—*Great Western Ry. Co.* v. *Bishop* (Law Rep. 7 Q. B. 550) distinguished. Bishop Auckland Local Board *v.* Bishop Auckland Iron Co. - - - - - 138

3. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150—*Justices*—"*Street*," *Definition of—Finding of Fact by Justices.*] By s. 4 of the Public Health Act, 1875, "in this Act, if not inconsistent with the context, the following words and expressions have the meaning hereinafter respectively assigned to them," and (amongst other definitions) "street includes any road," &c. By s. 150, "where any street within any urban district (not being a highway repairable by the inhabitants at large)" is not sewered, paved, and channelled to the satisfaction of the urban authority they may give notice to the owners of the adjoining premises to sewer, &c., the street, and on failure to comply with the notice the urban authority may execute the works themselves, and recover the expense of so doing from the adjoining owners in a summary manner. Summary proceedings having been taken by an urban authority to recover, under s. 150, the expense of sewering, &c., a road within the district which was not a highway repairable by the inhabitants at large:—*Held*, that it was a question of fact for the justices to determine whether or not the road was a street within s. 150, and that they were not bound to find as matter of law that it was a street by the terms of the definition in s. 4. Maude *v.* Baildon Local Board [394

4. —— *Streets—Paving—Expenses, Recovery of—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257, 268—*Appeal to Local Government Board—Prohibition.*] Under 38 & 39 Vict. c. 55, s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, and, on his default the authority executed the work, and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made upon him for the amount.—Under s. 268, he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board, stating the grounds of his complaint.—On a rule for a prohibition to the Local Government Board:—*Held*, that an appeal lay by the memorial to the Local Government Board, and that no prohibition ought to be granted. The Queen *v.* The Local Government Board - - C. A. 309

5. —— *Water—Supply of "Pure and Wholesome" — Contamination from Leaden Pipes—Deleterious Effect on Consumer — Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 35—*Special Act* (32 & 33 *Vict. c. cx*).] The defendants were empowered by a special Act (32 & 33 Vict. c. cx.), incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for

LOCAL GOVERNMENT ACTS—*continued.*
domestic use within the limits and from the sources described in their Act.—By s. 66 of the special Act the defendants were entitled to prescribe the material to be used for service pipes by persons supplied with water, and by by-laws the defendants prescribed that the material might either be lead or cast-iron. Leaden service-pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants from their mains to the house at the expense of the landlord and the plaintiff.—The service-pipes when laid belonged to the consumer of the water supplied through them.—By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same."—Water which was pure and wholesome in the mains of the defendants was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—*Held*, that he had no cause of action. MILNES *v.* THE MAYOR OF HUDDERSFIELD - - - - 124

LUNATIC—Business carried on in name of firm—Service on manager - - 471
See PRACTICE. 11.

MANOR—Arbitrary fine—Omission to demand exact sum - - - - 398
See COPYHOLD.

MARRIAGE—Right to solemnize—Fees - 418
See ECCLESIASTICAL LAW.

MARRIED WOMAN—Liability of husband after wife's death for her debts contracted before marriage - - - 129
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Employers' Liability Act* (43 & 44 *Vict. c.* 42), *s.* 6—*Action in County Court—Removal of.*] By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 6, "Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a county court may by law be removed."—A plaintiff having brought in the county court an action against his employers, to recover compensation under the Act for an injury through the breaking of a chain, applied for a certiorari to remove the action into the superior Court on the grounds that his notice given under the Act was defective; that he desired to consolidate the action with one brought by him in the superior Court to recover damages for the same injury from the defendants on their common law liability, and that the questions arising were of considerable complexity and legal difficulty:—*Held*, that the

MASTER AND SERVANT—*continued.*
power of removal ought only to be exercised in exceptional cases, and that no such special grounds had been shewn as to induce the Court in its discretion to grant the application. MUNDAY *v.* THAMES IRONWORKS AND SHIPBUILDING COMPANY, LIMITED - - - - 59

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (*sub-s.* 2), *s.* 8—*Negligence—Common Employment—"Person having superintendence entrusted to him."*] The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold:—*Held*, that J. was "engaged in manual labour," and was not "a person having superintendence entrusted to him," within the meaning of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 2, as defined by s. 8. SHAFFERS *v.* GENERAL STEAM NAVIGATION COMPANY 356

3. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—"*Railway*," *Meaning of.*] The meaning of the term "railway" as used in the 5th sub-section of the 1st section of the Employers' Liability Act, 1880, is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies also to a temporary railway laid down by a contractor for the purposes of the construction of works. DOUGHTY *v.* FIRBANK - - 358

4. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *subs.* 1—*Defect in the Condition of Way—Obstruction.*] A workman was employed in the defendants' iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a roadway of iron plates. While he was so engaged the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway, and a ball fell on him, causing personal injuries from which he died. In an action against the employers:—*Held* (by Field and Stephen, JJ.), that the obstruction caused by the substance projecting into the roadway was not a defect in the condition of the way within the meaning of the Employers' Liability Act, 1880, s. 1, subs. 1, and that the defendants were not liable. MCGIFFIN *v.* PALMER'S SHIPBUILDING AND IRON COMPANY - - - - 5

MAYOR'S COURT—*Jurisdiction—Power to give Judgment under Order XL., Rule* 10—*Judicature Act*, 1873, *s.* 89.] The judge of the Mayor's Court, London, has no power, on a motion before that Court for a new trial, to direct judgment to be entered for either of the parties in the action as a Judge of the High Court can do under Order XL., rule 10, no rules having been made for applying the rules of the Judicature Acts to that Court, and no such power being given to an inferior Court by s. 89 of the Judicature Act, 1873.—Where, notwithstanding such want of power, the judge of the Mayor's Court has acted as if he had such power, an appeal will lie to the

MAYOR'S COURT—*continued.*
Court of Appeal in respect of his having so erroneously acted. PRYOR *v.* THE CITY OFFICES COMPANY - - - - C. A. 504

METROPOLITAN BUILDINGS ACT, 1855—(18 & 19 *Vict. c.* 122), *ss.* 27, 28, 106—*Appeal—Conviction—United Buildings—Party-wall.*] By s. 9 of the Metropolitan Buildings Act, 1855, an addition to an old building is subject to the regulations of the Act; by s. 27, rule 4, certain buildings containing more than 216,000 cubic feet are to be divided by party-walls; and by s. 28, rule 2, no buildings shall be united, if when so united they will be in contravention of the Act. A new building was added to an old building, the united building containing more than 216,000 cubic feet:—*Held*, that the united building was not within the words of the Act, and need not be divided by a party-wall.—An appeal from the decision of a magistrate will lie under s. 106 of the Act, although there has not been a conviction. SCOTT *v.* LEGG - - C. A. 236

MINE—Reservation of minerals—Support—Inclosure - - - - 547
See INCLOSURE.

MUNICIPAL CORPORATION—*Election—Corrupt Practices—Time for delivery of Particulars—Corrupt Practices Municipal Elections Act*, 1872 (35 & 36 *Vict. c.* 60).] In a municipal election petition the respondent applied for an order for delivery of particulars of the alleged corrupt practices:—*Held*, that, in the absence of exceptional circumstances, the petitioners should not be ordered to deliver particulars more than seven clear days before the hearing of the petition. LENHAM *v.* BARBER - - - - 293

MURDER. ATTEMPT TO—Criminal law - 381
See CRIMINAL LAW.

NUISANCE—Highway—Local board - 138
See LOCAL GOVERNMENT ACTS. 2.

OFFICIAL REFEREE—Report—Application to set aside - - - - 332
See PRACTICE. 20.

PARLIAMENT—*Borough Vote—Description of Qualification—"Dwelling House"—Amendment under Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 12, 13.] The respondent had a sufficient qualification for the borough franchise as the occupier of a dwelling house under the Representation of the People Act, 1867, s. 3, but not under the Reform Act, 1832, s. 27, the yearly value of the house being under 10*l.*—The respondent's qualification was described in the list as "house." The respondent being objected to, the revising barrister was of opinion that such description was sufficient, but he amended it by adding the word "dwelling" to the word "house," and retained the respondent's name on the list:—*Held* (without determining whether the description as it originally stood was sufficient), that the case came within the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 12, and the revising barrister had power to make the amendment, and his decision was therefore correct. FRIEND *v.* TOWERS - - - - 87

PARLIAMENT—*continued.*
2. —— *Borough Vote—Dwelling-house—Part of a House—Vacant Room—Occupation as Householder or Lodger*—30 & 31 *Vict. c.* 102, *ss.* 3, 61—41 & 42 *Vict. c.* 26, *s.* 5.] The claimant of a borough vote had during the qualifying period occupied as sole tenant at a weekly rent a room in a house, which he furnished himself, as his residence. At the commencement of the qualifying period all the rooms in the house were similarly let off to tenants as their residences, each tenant having a key to his room and a key of the front door. During the qualifying period the tenant of one of the other rooms relinquished his tenancy, and gave up the key of his room and his front door key to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacant room. The landlord did not during any part of the qualifying period reside in the house or any part of it, either personally or by any servant, nor did he exercise any control over it, except such control, if any, as might by law be conferred on him by reason of the vacating of the room and the delivery of the keys to him by the outgoing tenant as aforesaid:—*Held*, affirming the judgment of the Queen's Bench Division, that the claimant was entitled to the franchise as an inhabitant occupier of a dwelling-house. ANCKETILL *v.* BAYLIS - - - - C. A. 577

3. —— *Election Petition—Inspection and Discovery—Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *ss.* 2, 26—*Rules of Michaelmas Term*, 1868, *r.* 44.] In a parliamentary election petition the Court or a judge at chambers has no jurisdiction to make orders against the sitting member for inspection and discovery of documents. MOORE *v.* KENNARD - - - - 290

PARTNER—Action against partners in name of firm - - - - 475
See PRACTICE. 13.

—— Action against partner in name of firm 436
See PRACTICE.

PARTNERSHIP—Realty—Probate duty - 488
See REVENUE. 3.

PENALTIES, ACTION FOR—Interrogatories 459
See PRACTICE. 14.

POOR-LAW—*Settlement by Residence—Illegitimate Child above Sixteen—Idiot—Residence as part of Family*—24 & 25 *Vict. c.* 55, *s.* 10; 28 & 29 *Vict. c.* 79, *s.* 8; 39 & 40 *Vict. c.* 61, *s.* 34.] The pauper, an illegitimate child, and an idiot from her birth, resided after the age of sixteen for more than three years continuously in P. with her mother and her mother's husband, living as part of their family:—*Held*, that, notwithstanding the circumstances of her residence, she had under the Divided Parishes Act (39 & 40 Vict. c. 61, s. 34), acquired a settlement in P. GUARDIANS OF SALFORD *v.* OVERSEERS OF MANCHESTER - 172

POOR-RATE—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67)—*Rateable Hereditaments—Bookstalls on a Railway Platform—Exclusive Occupation—Exclusive Enjoyment—Licence or Demise.*] By indenture the South Western Railway Company granted to S. & S. (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books,

POOR-RATE—*continued.*

periodicals, stationery, &c., and such other like articles required for the convenience of passengers by railway, as should be approved by the secretary of the company, at all their stations," &c.; and also full liberty for the "tenants," subject to the approval of the engineer of the company, to erect and place bookstands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls; and also full and free ingress and egress at all reasonable times for the "tenants," their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by S. & S. were to be under the control of the station-master, and liable to immediate removal from the station in case of insobriety or misconduct. S. & S. were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. & S. for the posting of the advertisements, &c., with a proviso that in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company in addition to any other remedies, "by distress, as in the case of rent in arrear." And it was provided that the "tenants" should not vend or offer for sale, or exhibit or publish, any books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company; and should abide by and observe the regulations from time to time made by the company, touching the placing on the platforms any of the necessary bookstands; and the company warranted to the "tenants" "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid."—S. & S. erected bookstands upon the platforms at W. station, and had the exclusive use of them; and these bookstands were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstands, were exercised by S. & S., or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor rate for the station generally:—*Held*, that S. & S. had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstands.—Judgment of the Queen's Bench Division (9 Q. B. D. 585) affirmed. SMITH *v.* LAMBETH ASSESSMENT COMMITTEE - - - - - **C. A. 327**

PRACTICE—*Appeal—Order as to Costs only—Discretion of Court—Costs of Inspection—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.] An order was made in chambers for the inspection of the defendants' property, the costs of the inspection to be paid by the plaintiff:—*Held*, that under Order LII. r. 3, the judge had a discretion to order the plaintiff to pay the costs, and the order being made in his discretion the plaintiff had no right without leave to appeal from it. MITCHELL *v.* DARLEY MAIN COLLIERY COMPANY - **457**

2. —— *Court of Appeal—Jurisdiction—Criminal Matter—Bail*—36 & 37 *Vict. c.* 66, *ss.* 19, 47.] A prisoner applied for bail to a Divisional Court

PRACTICE—*continued.*

of the Queen's Bench Division but was refused; he then appealed to the Court of Appeal:—*Held*, that the decision of the Divisional Court was a judgment of the High Court in a criminal matter, and therefore that the Court of Appeal had no jurisdiction to entertain the appeal. THE QUEEN *v.* FOOTE - - - - - **C. A. 378**

3. —— *Bankruptcy of Plaintiff—Refusal of Trustee to proceed with Action—Stay of Proceedings.*] Where the plaintiff is adjudicated bankrupt after action brought and his trustee declines to proceed with the action, it may be stayed by an order in chambers, and the defendant need not plead the bankruptcy in bar. WARDER *v.* SAUNDERS - - - - - - **114**

4. —— *Costs—Counsel at Chambers—Solicitor and Client—Taxation—Special Allowances—Rule* 14.] The Supreme Court Rules, Special Allowances, r. 14, that "as to counsel attending at judge's chambers no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend" applies to taxation of costs between solicitor and client as well as between party and party:—So *held*, affirming the decision of the Queen's Bench Division (9 Q. B. D. 254). IN RE CHAPMAN. [**C. A. 54**

5. —— *Costs—Higher Scale—Injunction—"Injury to Property"—Trespass.*] In Order VI. r. 2. of the Rules of the Supreme Court (Costs)—which allows costs on the higher scale in actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, &c.—the "injury to property" must be a substantial physical injury, and does not include a trespass upon land without injury to the soil, though of a permanent character and committed in the assertion of title. *Chapman* v. *Midland Ry. Co.* (5 Q. B. D. 167, 431) discussed. GOODHAND *v.* AYSCOUGH - - - - - - **71**

6. —— *Costs—Judgment, Form of—Claim and Counter-claim.*] The plaintiff's claim being for the balance of the contract price of work done, after giving credit for money paid on account, the defendants by way of set-off and counter-claim claimed in respect of the inferiority and defective character of the work. The action being referred for trial to an official referee, he found by his report that a balance of 32*l.* 18*s.* 6*d.* remained due to the plaintiff on his claim in respect of the contract price of the work, and that 34*l.* 10*s.* 6*d.* was due to the defendants on their counter-claim:—*Held*, that the proper judgment on these findings was that the defendants do recover the balance of 1*l.* 12*s.*, and the costs of the action, on the ground, either that the inferiority of the work, though pleaded by way of counter-claim in form, in reality amounted to a defence, or that, even if the plaintiff were technically entitled by the findings to the costs of the action, the Court ought to interfere under Order LV., Rule 1, and give the costs to the defendants who had substantially succeeded in the action. LOWE *v.* HOLME - - **286**

7. —— *Security for Costs—Joint Plaintiffs, one residing Abroad—Joint and Separate Claims*

PRACTICE—*continued.*

—*Order XVI. r.* 1.] An action was brought against the defendant as a common carrier by two plaintiffs, one residing abroad. The statement of claim alleged a contract by the defendant with the plaintiffs jointly, and in the alternative with each of the plaintiffs separately:—*Held*, that the plaintiff residing abroad could not be ordered to give security for costs. D'HORMUSGEE *v.* GREY - - - - - - **13**

8. —— *Costs—Shorthand Notes—Solicitor and Client—Taxation.*] Where a solicitor proposes to incur unusual expense in the course of an action, such as taking shorthand notes of the evidence or procuring the attendance of experts and scientific witnesses, it is his duty to point out to his client that such expense might not be allowed on taxation as between party and party, and might therefore have to be borne by the client whatever might be the result of the trial. Therefore where the solicitor had omitted such duty, he was not allowed on taxation as between solicitor and client the costs of shorthand notes of the evidence, although the client authorized him to employ a shorthand writer to take such notes and used and otherwise availed himself of them after they had been so taken. IN RE BLYTH & FANSHAWE - - - - **C. A. 207**

9. —— *Interrogatories as to Publication of Libel—Refusal to Answer—Incrimination—Privilege.*] An objection to answer interrogatories which is made by affidavit on the ground of the tendency of the answer to criminate the person interrogated may be valid, although not expressed in any precise form of words, if, from the nature of the question and the circumstances, such a tendency seems likely or probable. In an action for libel the defendant pleaded a denial of the publication, and to interrogatories asking him, in effect, whether he published the libel he stated by his affidavit in answer: "I decline to answer all the interrogatories upon the ground that my answer to them 'might' tend to criminate me":—*Held*, that his answer was sufficient. LAMB *v.* MUNSTER - - **110**

10. —— *Interrogatories—Sufficiency of Answer—Answers as to matters done by the Agent or Servant of the Person interrogated.*] A party to a cause is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment; and he is bound to obtain the information from such agents or servants, unless he shew that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of detail or the like. Therefore in an action by cargo owners against the owners of a ship, for a loss alleged to have arisen from negligence in the navigation of such ship by which she ran ashore and was stranded, an answer by the defendants to interrogatories as to what was done by those on board with regard to such navigation at the time of the accident, which stated in substance that the defendants were not on board at the

PRACTICE—*continued.*

time and had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which the plaintiffs had had inspection, was held insufficient, as it did not appear that there was any difficulty in the defendant's obtaining the required information from those who were in charge of the ship at the time of the accident. BOLCKOW *v.* FISHER **[C. A. 161**

11. —— *Lunatic Defendant—Business carried on in name of Firm—Service on Manager—Order IX., rr.* 5, 6, 6*a*—*Order XIII. r.* 1.] The defendant, who carried on business in the name of a firm apparently consisting of more than one person, was sued in her firm name; the writ was served at her place of business upon the manager according to Order IX. r. 6a; and judgment signed in default of appearance. At the time of the service of the writ she was of unsound mind and confined in an asylum, but this was unknown to the plaintiff:—*Held*, that the judgment must be set aside, as the writ ought to have and had not been served under Order XIII. r. 1. THE FORE STREET WAREHOUSE CO. *v.* DURRANT - **471**

12. —— *Action against Partners in Name of Firm—Right to proceed against existing Partners together with former Partner—Presumption as to Partners intended to be sued as Defendants under Name of Firm—Judgment by Default—Order XVI. r.* 10: *Order XLII. r.* 8.] The plaintiffs having brought an action and obtained judgment against the firm of "H. & D.," applied to a judge under Order XLII. rule 8, for leave to issue execution against M. as being a member of the firm. It appeared that the action was upon a bill of exchange drawn by D. at a time when M., H. & D., were partners in the firm of H. & D., but that M. had retired from the partnership prior to the issuing of the writ, and that the firm of H. & D. then continued, but consisted of H. & D. only. The bill was drawn without the knowledge or consent of M., and for a purpose unconnected with the partnership:—*Held*, by Watkin Williams, J., first, that under Order XVI. rule 10—which enables two or more persons being liable as co-partners to be sued in the name of their firm—the right to sue partners in the name of a firm is not limited to the case of partners carrying on business at the date of the writ: secondly, that it was a question of fact, having regard to the circumstances and the proceedings subsequent to the writ, whether the plaintiff intended to sue under the firm name those partners only who were members of the firm at the commencement of the action, or the same persons together with any former partner. *Ex parte Young* (19 Ch. D. 124) considered. DAVIS *v.* MORRIS - - - - - **436**

13. —— *Action against Partners in Name of Firm—Appearance by one Partner only—Judgment entered against Partner appearing instead of against Firm — Application to issue Execution against other Partner—Amendment of Judgment—Form of Issue—Order XII. r.* 12; *Order XLII. r.* 8.] The plaintiff issued a writ against the firm of R. & Co. R. only appeared to the writ, and the plaintiff delivered statement of claim against "R. sued as R. & Co." Issue having been joined,

PRACTICE—*continued.*

the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R. sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it, in accordance with the writ, a judgment against the firm of R. & Co., and for an issue under Order XLII., r. 8, to determine the liability of C.:—*Held*, that the amendment ought to be allowed, for the plaintiff, having acted in ignorance of the facts, was not concluded by the form of the proceedings subsequent to the writ and that the issue must be granted not merely to determine whether C. was a member of the firm, but whether he was jointly liable with R. in the action. MUNSTER *v.* RAILTON - - **475**

14. —— *Action for Penalties—Discovery—Interrogatories—Order XXXI. rr.* 1, 12.] In an action for penalties the plaintiff is not entitled to administer interrogatories or to discovery of documents under Order XXXI., that order not being intended to give the right to discovery in cases where prior to the Judicature Acts discovery was not obtainable. HUNNINGS *v.* WILLIAMSON [**459**

15. ——*Admission on Pleadings—Claim, Admission of—Counterclaim—Order XL. r.* 11.] In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counterclaim for unliquidated damages to a greater amount.—The Court refused an application under Order XL. r. 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into Court to abide the result of the action. THE MERSEY STEAMSHIP CO. *v.* SHUTTLEWORTH - - - - - - **468**

16. —— *Pleading—Notice in lieu of Claim—Order XXI., r.* 4—*Objection on ground of Insufficiency—Demurrer.*] A writ was specially indorsed, "The plaintiff's claim is against the defendant as the acceptor of a bill of exchange. The following are particulars:—Bill of exchange for 180*l.*, dated 27th of March, 1882, drawn by C. upon and accepted by defendant, payable three months after date."—The plaintiff having delivered a notice under Order XXI., r. 4, that his claim was that which appeared by the indorsement on the writ, the defendant demurred on the ground that the statement was insufficient and disclosed no cause of action:—*Held*, that there was no ground of demurrer, and that the defendant's remedy, if any, was to apply for a further statement under the rule.—*Robertson* v. *Howard* (3 C. P. D. 280) disapproved. FAWCUS *v.* CHARLTON - **516**

17. —— *Production of Documents—Power of the Court to disregard the Affidavit as to the nature and effect of the Documents.*] Although a defendant to an action swears that certain documents, which are in his possession and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plaintiff's case or impeach the defence, the Court will not act on such oath (at least in proceedings excepted by Order LXII. from the rules under the Judicature Act, 1875), but will order such documents to be produced, if,

PRACTICE—*continued.*

from the whole of the defendant's answer or from the description of the documents given by the defendant, the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents. THE ATTORNEY GENERAL *v.* EMERSON - **C. A. 191**

18. —— *Production of Documents—Joint Possession—Joint Tenancy—Documents of Title.*] In an action for the seizure of the goods of the plaintiff on certain premises which was justified by the defendants under an alleged power of distress in a mortgage deed, the defendant stated in his affidavit of documents that he and one B. jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and the said B. to the premises as mortgagees thereof. The affidavit further stated that the defendant objected to produce such documents. B. was no party to the action:—*Held*, that such affidavit shewed sufficient reason for not making an order for inspection of the documents.—*Murray* v. *Walter* (Cr. & Ph. 114) followed. *Walburn* v. *Ingilby* (1 My. & K. 61) and *Hutchinson* v. *Glover* (1 Q. B. D. 138) discussed. KEARSLEY *v.* PHILIPS - - - - - **36**

19. —— *Production of Documents—Joint Possession—Documents of Title.*] In an action for the seizure of the goods of the plaintiff, which was justified by the defendant under an alleged power of distress in a mortgage deed, the defendant stated in his affidavit of documents that he and one B., who was not a party to the action, jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and the said B. as mortgagees, and that he the defendant objected to their production:—*Held*, affirming the decision of the Queen's Bench Division, that such affidavit shewed sufficient reason for not making an order for inspection of the documents.—*Murray* v. *Walter* (Cr. & Ph. 114) followed. KEARSLEY *v.* PHILIPS **C. A. 465**

20. —— *Referee—Report to Judge—Application to set aside—Where made—Within what time made—Judicature Act*, 1873, *ss.* 56-58.] Application to set aside the findings of a referee appointed under s. 57 of the Judicature Act, 1873, to try the issues of fact in an action and report to the judge making the order of reference, must be made to a Divisional Court and not to the judge, as such findings are by s. 58 equivalent to the verdict of a jury and can only be set aside by the Court.—*Quære*, whether the time for making the application runs from the time when the report is made to the judge. COOKE *v.* NEWCASTLE AND GATESHEAD WATER COMPANY - - **332**

—— Action sent for trial to county court—Unliquidated damages - - **11**
See COUNTY COURT.

—— Mayor's Court—Power to give judgment under Order XL., rule 10 - - **504**
See MAYOR'S COURT.

PROBATE DUTY—Realty—Partnership assets
See REVENUE. [**488**

PRODUCTION OF DOCUMENTS—Joint possession
See PRACTICE. 18. [**36**

PROHIBITION—Local Government Board 309
See LOCAL GOVERNMENT ACTS. 4.

RAILWAY—*Carrier—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Alternative Rates—Special Condition.*] The defendants, a railway company, were in the habit of receiving consignments of fish from fish merchants, of whom the plaintiff was one, at a seaport to be carried by trains which arrived in London in time for the Billingsgate Market at 5 A.M. The defendants offered to those fish merchants, who were disposed to accept it, to carry the fish at rates one-fifth lower than the ordinary rates of carriage, if they would sign a risk note by which they undertook and agreed to relieve the defendants "from all liability for loss or damage by delay in transit, or from whatever other cause arising." The plaintiff signed such risk note, and afterwards delivered fish to the defendants to be carried at the lower rates. On one occasion, in consequence of an unusually large supply of fish, there was a delay in despatching the trains, so that the plaintiff's fish arrived too late for the Billingsgate Market. Though the defendants knew that the fish could not on this occasion be despatched at the ordinary time, they gave the plaintiff no notice of this, but received his fish as usual. In an action for such delay, by which the market had been lost:—*Held*, reversing the decision of the Queen's Bench Division, that, as by the exigencies of trade the plaintiff, in order to compete with others in the trade, was obliged to send his fish at the lower rates offered by the defendants, he practically had no option, and therefore the contract contained in the risk note, by which the plaintiff freed the defendants from all liability, was not just or reasonable, and was invalid by s. 7 of the Railway and Canal Traffic Act, 1854:—*Semble*, per Baggallay and Brett, L.JJ., that even if there had been an option, yet a contract such as above, by which the railway company were freed from all liability however occasioned, was not just or reasonable:—*Held*, further, that the delay, the subject of the action, was not outside the contract, but was covered by it.—And also that s. 7 of the Railway and Canal Traffic Act, 1854, included loss from delay, but at all events, even if it did not, that the above contract was one and indivisible, and as it was void as to other losses which it covered, it was void altogether. BROWN *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY - - - - C. A. 250

2. —— *Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 11—*Through Traffic, Facilities for forwarding—Through Rate—Intermediate Railway Company, whether entitled to require through Rate for Traffic to and from Termini off their own Line.*] By s. 2 of the Railway and Canal Traffic Act, 1854, every railway company shall afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon its railway whether belonging to or worked by such company, and by s. 11 of the Regulation of Railways Act, 1876, the facilities to be so afforded are declared to be and shall include "the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of through traffic to and from the railway of any other such company at through rates." The Central Wales Railway Company applied to the Railway Commissioners for an order under s. 11, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route claimed being from Chester, over lines owned or worked by the London and North Western Railway Company, and over the applicants' own line, which was worked by the same company under an agreement with the applicants, and thence to Haverfordwest over the Great Western Company's line, which was worked and owned exclusively by that company, and vice versâ from Haverfordwest to Chester. The applicants had no rolling stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders:—*Held*, that the traffic was "through traffic to and from" the applicants' railway, and that the applicants were a railway company entitled to request a through rate in respect of such traffic, within the meaning of s. 11, and therefore that the Railway Commissioners had jurisdiction to make the order. GREAT WESTERN RAILWAY COMPANY *v.* CENTRAL RAILWAY COMPANY - - - - - 231

RAPE—Girl between twelve and thirteen - 74
See CRIMINAL LAW. 4.

RENT—Apportionment—Assignment of reversion
See LANDLORD AND TENANT. [48

REVENUE—*Beer—Brewer other than a Brewer for Sale—Exemption from Duty—Annual Value of House occupied not exceeding* 10*l.—Inland Revenue Act*, 1880 (43 & 44 *Vict. c.* 20), *s.* 33, *sub-s.* 3.] By the Inland Revenue Act, 1880, s. 33, sub-s. 3, if the annual value of the house occupied by a brewer other than a brewer for sale does not exceed 10*l.*, the beer brewed by him shall not be charged with duty. The respondent brewed beer (not for sale) in a house occupied by him of an annual value not exceeding 10*l.*, and he occupied as a residence, another house which was of greater annual value than 10*l.*:—*Held*, that the exemption from duty did not apply to the beer so brewed. TIPPETT *v.* HART - - - 483

2. —— *Income Tax—Justices—Assize Courts—Police Stations*—5 & 6 *Vict. c.* 35—16 & 17 *Vict. c.* 34—*Schedules A. and B.*] The justices of a county, in the due exerise of statutory powers, erected assize courts, with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there, and for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him and his successors for ever upon trust for the public uses or purposes of the county. The courts, police station, offices, and rooms formed one block of buildings, and were used for the administration of justice, and for police and public purposes. —Parts of the buildings were also used for holding county and committee meetings, and various other occasional purposes, but no rent or profit was received or made in respect of the buildings, or any part of them:—*Held*, affirming the judgment of the Queen's Bench Division, that the

REVENUE—*continued.*
income tax was not payable in respect of the buildings under Schedules A. or B. of the Income Tax Acts. COOMBER *v.* THE JUSTICES OF BERKS [C. A. 267

3. —— *Probate Duty—Realty forming Part of Partnership Assets—Conversion.*] The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty. *Custance* v. *Bradshaw* (4 Hare, 315) discussed. THE ATTORNEY GENERAL *v.* HUBBUCK [488

RIVER—"Tributary"—Salmon fishery - 131
See SALMON FISHERY. 2.

RULES—Order IX., rr. 5, 6, 6a. - - 471
See PRACTICE. 11.

—— Order XII., r 12. - - - 475
See PRACTICE. 13.

—— Order XIII., r. 1. - - - 471
See PRACTICE. 11.

—— Order XVI., r. 1 - - - 13
See PRACTICE. 7.

—— Order XVI., r. 10 - - - 436
See PRACTICE. 12.

—— Order XXI., r. 4 - - - 516
See PRACTICE. 16.

—— Order XXXI., rr. 1, 12 - - - 459
See PRACTICE. 14.

—— Order XL., r. 10. - - - 504
See MAYOR'S COURT.

—— —— r. 11 - - - - 468
See PRACTICE. 15.

—— Order XLII., r, 8 - - - 475
See PRACTICE. 13.

—— Order LII., r. 3 - - - 457
See PRACTICE.

SALMON FISHERY—*Placing a Device to catch Fish—Permanent Structure erected before the passing of the Act.*] The 15th section of the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 15, enacts that no person between the 1st day of January and the 24th day of June shall place in any inland water any device whatsoever to catch or obstruct any fish descending the stream.—A permanent structure for the purpose of catching eels had been erected at a weir upon a river before the passing of the above-mentioned Act. The nature of such structure was as follows:—There were floodgates or shuttles in the weir, and a grating of iron bars, through which the eels could not pass, was fixed below such floodgates. When the floodgates were raised the rush of water through them carried the eels on to and over the end of the grating into a trough, which communicated with a well from which they could not escape. The appellant, on a day between the 1st of January and the 24th of June, 1882, raised the flood-gates and so brought the trap into action, with the result that eels were caught in the trap:—*Held*, that by so doing the

SALMON FISHERY—*continued.*
appellant had been guilty of an offence within the above-mentioned section. BRIGGS *v.* SWANWICK [510

2. —— *Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 3—*Fishery Districts—Definition of Limits by Secretary of State's Certificate—River—"Tributary," what is—Reservoirs.*] By 28 & 29 Vict. c. 121 the limits of a river shall be defined, and a fishery district shall be formed, for the purpose of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river and district, and by s. 3, "river" shall include "such portion of any stream with its tributaries" as may be declared in the certificate. Prior to 1845 the Whittle Burn in the county of Northumberland was a tributary of the Tyne. In 1845 a water company, under powers given by local Acts, constructed works for the supply of water to a neighbouring town, by placing a dam across the stream of the Whittle Burn, and forming a series of reservoirs; the water being taken by underground pipes from the stream into the highest reservoir, and from thence to the others. All water not required for the reservoirs was allowed to pass down a watercourse running outside the reservoirs into the ancient watercourse of the burn, down which it flowed into the Tyne. Sometimes all the water coming down the Whittle Burn was taken into, and impounded in, the reservoirs, and none flowed into the Tyne. At other times all the water flowed into the Tyne without having entered the reservoirs. There were outlets with sluices from the reservoirs by which surplus water flowed into the Tyne down watercourses also running into the ancient watercourse of the burn. In 1866, the Fishery District of the River Tyne was formed and the Secretary of State's certificate defined the limits as "so much of the river Tyne with its tributaries" as was situate (inter alia) in the county of Northumberland:—*Held*, that the reservoirs were not tributaries of the Tyne within the meaning of the certificate. HARBOTTLE *v.* TERRY - - - 131

SERVICE — Lunatic — Business carried on in name of firm - - - 471
See PRACTICE. 11.

SEWERING AND PAVING—Appeal to Local Government Board - - - 309
See LOCAL GOVERNMENT ACTS. 4.

SHIP—*General Average—Charterparty—Deck Cargo Jettisoned—"At Merchant's Risk."*—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk:"—*Held*, that the words "at merchant's risk," excluded any right on the part of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers and jettisoned. BURTON *v.* ENGLISH - - - 426

2. —— *Bill of Lading—Exceptions—Collision between Two Ships belonging to the same Owner—Negligence of Master and Crew—Action of Tort—Variance between Rules of Admiralty Court and Courts of Common Law—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.] The plaintiffs shipped goods on board

SHIP—*continued.*

the defendants' vessel, the *Crown Prince*, under a bill of lading, which contained exceptions of, among other things, "collision," and "accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company, in navigating the ship." In the course of the voyage the *Crown Prince* came into collision with another vessel of the defendants, the *Atjeh*. The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the *Atjeh* was mainly in fault; but the *Crown Prince* also was in some degree to blame:—*Held*, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of failure to perform the undertaking therein contained to carry the goods safely upon the voyage:—Per Brett, L.J.:—No stipulation on the part of the defendants could be implied as to the conduct of those on board the *Atjeh*, and although the negligence of the *Atjeh* was not within the exceptions, nevertheless it was not within the contract created by the bill of lading:—Per Baggallay and Lindley, L.JJ.:—The exception "collision," although it did not cover the negligence of the *Crown Prince*, covered the negligence of the *Atjeh*, and the defendants were expressly relieved from liability for the negligence of the *Crown Prince* by the other exceptions in the bill of lading:—*Held*, further, that the defendants were liable in tort for the negligence of those engaged in navigating the *Atjeh*, but that the amount payable by the defendants must be limited to one half of the loss sustained by the plaintiffs, pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9. Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co.
[C. A. 521

3. —— *Charterparty, construction of—Customary manner of Loading—Detention by Frost—Demurrage.*] By the terms of a charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron, the cargo to be loaded as fast as ship could take on board and stow within the customary working hours of the port, commencing when ship was in berth and ready to load, "detention by frost, floods, &c., not to be reckoned as lay days." At Cardiff there are two docks, the East Bute Dock and the West Bute Dock, connected by a canal, and the West Bute Dock is connected by a junction canal with the Glamorganshire Canal. The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six manufacturers of rail iron there, and all of them (with the exception of the freighters' agents) had wharves in the East or West Bute Dock. The agent's wharf was on the Glamorganshire Canal, nearly opposite the junction canal, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down the junction canal, through the West Bute Dock, and from thence through the connecting canal to the East Bute Dock. The other manufacturers loaded ships in the East Bute Dock, either from the quay or by

SHIP—*continued.*

lighters coming from their wharves.—The ship on arrival was berthed in the East Bute Dock, and the loading was commenced, but it was delayed afterwards for sixteen days by frost, which covered with ice the junction canal, from the agent's wharf to the West Bute Dock, and prevented there the passage of the lighters, though the water in the docks was not frozen:—*Held*, reversing the decision of Pollock, B., that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability for demurrage, as the lighters with the cargo for the ship had not got within the limits of the East Bute Dock where the ship was to be loaded, before the detention by frost had happened. Kay *v.* Field **C. A. 241**

4. —— *Liability for Freight—Indorsee of Bill of Lading—"Passing of Property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 1.] The shipper of goods does not, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, "pass the property" in the goods to such indorsee so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1.—The shipper of goods indorsed the bill of lading in blank, and delivered it to the defendants' bankers by way of security for money advanced by them. The goods upon their arrival at the port of destination were sold for an amount insufficient to pay the freight:—*Held*, that the property in the goods had not passed to the defendants within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1, so as to make them liable in an action by the shipowner for the freight. Burdick *v.* Sewell - **363**

—— Larceny from British ship in foreign port
See Criminal Law. 2. [76

STATUTES:

32 Hen. 8, c. 34 - - - - **48**
See Landlord and Tenant.

11 Geo. 4 & 1 Wm. 4, c. 68, s. 1 - - **142**
See Carrier.

3 & 4 Wm. 4, c. 74, s. 91 - - - **284**
See Husband and Wife.

5 & 6 Vict. c. 35 - - - - **267**
See Revenue. 2.

6 & 7 Vict. c. 37, ss. 11, 15 - - **418**
See Ecclesiastical Law. 2.

8 & 9 Vict. c. 109, s. 18 - - - **100**
See Gaming.

10 & 11 Vict. c. 17, s. 35 - - - **124**
See Local Government Acts. 5.

10 & 11 Vict. c. 27, s. 83 - - - **387**
See Harbour.

16 & 17 Vict. c. 34 - - - - **267**
See Revenue.

17 & 18 Vict. c. 31, s. 7 - - - **250**
See Railway.

18 & 19 Vict. c. 111, s. 1 - - - **363**
See Ship. 4.

19 & 20 Vict. c. 104, ss. 14, 15 - - **418**
See Ecclesiastical Law

STATUTES—*continued.*

19 & 20 Vict. c. 108, s. 26 - - - 11
See COUNTY COURT.

24 & 25 Vict. c. 100, ss. 48, 51 - - 74
See CRIMINAL LAW. 4.

—— —— ss. 14, 15 - - - 381
See CRIMINAL LAW. 3.

28 & 29 Vict. c. 121, s. 3 - - - 131
See SALMON FISHERY. 2.

29 & 30 Vict. c. 118, s. 14 - - 360
See INDUSTRIAL SCHOOL.

30 & 31 Vict. c. 102, ss. 3, 61 - - 577
See PARLIAMENT.

31 & 32 Vict. c. 125, ss. 2, 26 - - 290
See PARLIAMENT. 3.

32 & 33 Vict. c. 67 - - - - 327
See POOR-RATE.

32 & 33 Vict. c. 71, s. 39 - - - 22
See BANKRUPTCY.

32 & 33 Vict. c. cx. - - - 124
See LOCAL GOVERNMENT ACTS. 5.

33 & 34 Vict. c. 52, ss. 9, 10 - - 513
See CRIMINAL LAW.

35 & 36 Vict. c. 60 - - - - 293
See MUNICIPAL CORPORATION.

36 & 37 Vict. c. 38, s. 3 - - - 44
See GAMING.

36 & 37 Vict. c. 66, ss. 19, 47 - - 378
See PRACTICE. 2.

—— —— s. 49 - - - - 457
See PRACTICE.

36 & 37 Vict. c. 66, s. 25, sub-s. 9 - 521
See SHIP. 2.

36 & 37 Vict. c. 71, s. 15 - - - 510
See SALMON FISHERY.

37 & 38 Vict. c. 50, ss. 1, 2 - - 129
See HUSBAND AND WIFE.

38 & 39 Vict. c. 55, ss. 116, 117 - - 63
See LOCAL GOVERNMENT ACTS.

—— —— s. 149 - - - - 118
See HIGHWAY. 2.

—— —— ss. 150, 257, 268 - - 309
See LOCAL GOVERNMENT ACTS. 4.

—— —— ss. 4, 150 - - - 394
See LOCAL GOVERNMENT ACTS. 3.

—— —— s. 91, sub-s. 4 - - - 138
See LOCAL GOVERNMENT ACTS. 2.

38 & 39 Vict. c. 63, ss. 6, 8 - - 518
See ADULTERATION.

38 & 39 Vict. c. 94, s. 4 - - - 74
See CRIMINAL LAW. 4.

41 & 42 Vict. c. 26, s. 28, sub-s. 12 - 87
See PARLIAMENT.

—— —— s. 5 - - - - 577
See PARLIAMENT. 2.

41 & 42 Vict. c. 31, s. 10, sub-s. 2 - 90
See BILL OF SALE.

—— —— ss. 14, 23 - - - 477
See BILL OF SALE. 3.

41 & 42 Vict. c. 77, s. 13 - - - 480
See HIGHWAY.

42 & 43 Vict. c. 30, s. 6 - - - 518
See ADULTERATION.

STATUTES—*continued.*

43 & 44 Vict. c. 15, s. 1 - - - 360
See INDUSTRIAL SCHOOL.

43 & 44 Vict. c. 20, s. 33, sub-s. 3 - 483
See REVENUE.

43 & 44 Vict. c. 42, s. 1 - - - 5
See MASTER AND SERVANT. 4.

—— —— s. 1, sub-s. 2 - - - 356
See MASTER AND SERVANT. 2.

—— —— s. 1, sub-s. 5 - - - 358
See MASTER AND SERVANT. 3.

—— —— s. 6 - - - - 59
See MASTER AND SERVANT.

45 & 46 Vict. c. 43, ss. 7, 9 - - 414
See BILL OF SALE. 2.

STREET—Definition - - - - 394
See LOCAL GOVERNMENT ACTS. 3.

TRESPASS—*Entry of Ox into Shop adjoining Street—Absence of Negligence—Liability.*] An ox belonging to the defendant and while being driven by his servants through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved:—*Held*, that the defendant was not liable. TILLETT *v.* WARD - - - - 17

WATERWORKS COMPANY—*Mode of calculating Water-rate—"Gross estimated Rental"—"Rateable Value"—"Annual Value."*] By one of the special Acts of a waterworks company (7 Geo. 4, c. cxl. s. 27), it was provided that the water-rate was to be payable "according to the actual amount of the rent where the same can be ascertained, and where the same can not be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed." By a later special Act (15 & 16 Vict. c. clvii. s. 46), the waterworks company were compelled to supply water to occupiers of dwelling-houses for domestic purposes at the following rates, viz., "where the 'annual value' of the dwelling-house shall not exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 4*l.*, and where such 'annual value' shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*"—D. was the occupier and the lessee for a long term at a ground rent of a house supplied with water by the waterworks company:—*Held*, reversing the decision of the Queen's Bench Division, that the water-rate must be computed on the "gross estimated rental" or "gross value" and not on the rateable value as appearing in the poor-rate assessment of the house supplied with water:—*Semble*, that "annual value" as used in 15 & 16 Vict. c. clvii. s. 46, means the rack rent paid by the tenant to the landlord. DOBBS *v.* GRAND JUNCTION WATERWORKS COMPANY - - - - - C. A. 337

WATERWORKS—Supply of pure water—Local Board - - - - 124
See LOCAL GOVERNMENT ACTS. 5.

WILL—Promise to devise interest in land by will - - - - - 148
See FRAUDS, STATUTE OF.

WORDS—"At merchant's risk" - - 426
See Ship.
—— "Capture and seizure" - - 432
See Insurance (Marine).
—— "Dwelling-house" - - - 87
See Parliament.
—— "Injury to property" - - - 71
See Practice. 5.
—— "Nuisance or injurious to health" - 138
See Local Government Acts. 2.
WORDS—*continued.*
—— "Open and public place" - - 44
See Gaming.
—— "Pure and wholesome water" - 124
See Local Government Acts. 5.
—— "Railway" - - - - 358
See Master and Servant. 3.
—— "Street" - - - - 394
See Local Government Acts. 3.
—— "Tributary" - - - - 131
See Salmon Fishery. 2.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

L 26 MAY 1964